



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tuwei v Winguard Services Ltd (Employment and Labour Relations Cause  
E1329 of 2022) [2025] KEMC 164 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEMC 164 (KLR)

**REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1329 OF 2022**

**TM OLANDO, PM**

**JULY 25, 2025**

**BETWEEN**

**AMOS KIPKIRUI TUWEI ..... CLAIMANT**

**AND**

**WINGUARD SERVICES LTD ..... RESPONDENT**

**JUDGMENT**

**Pleadings**

1. The claimant filed this suit seeking for the following orders :-
  - a. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
  - b. A declaration that the respondent's failure to issue to the claimant an employment contract is in contravention of sections 10(1), 10(2), 10(3)a, 10(3) c of the Employment Act as read together with section 16(1) and 16(4).
  - c. Upon allowing prayer (b), the court to proceed and penalize the respondent pursuant to sections 16(2) and (4) of the Employment Act. 13
  - d. A declaration that the respondent subjecting the claimant to overtime without pay, working public Holidays without pay amounts to unfair labour practices.
  - e. Upon allowing prayer (d) above, the claimant be awarded punitive and exemplary damages.
  - f. A declaration that the Respondent's action of paying the claimant a salary below the minimum wage amount to unfair labour practices.
  - g. Upon allowing prayer (f) above, the claimant be awarded punitive and exemplary damages.



- h. Maximum compensation for wrongful dismissal
- i. special damages
  - a) Payment in lieu of notice. .KSh.17,413.2425/=
  - b) Damages for wrongful dismissal.  $17,413 \times 12 \text{ months} = 208,958$ . .KSh.208,958.00/=
  - c) Housing allowance .KSh.52,200.00/= 15% of 14,500 =Ksh 2,175 Ksh 2,175 x 24= d) Overtime. October 2019-October 2021,  $72-52=20$  hours 96 weeks x 20 hours x 136.55 x 1.5= KSHS 393,264
  - e) Holidays. 2019-2020 (24 days x 12 hours x 136.55 x 2) = 39,326.4 .KSh.39,317.00/
  - f) Leave days not taken. .Ksh 34,826.00 October 2019 October 2020 Ksh 17,413 x 2 KSHS 34,826.00
  - g) Severance pay. Ksh  $17,413/26 \times 18 \times 2$  .Ksh 24,110.00
  - h) Interest on all the above
  - i) costs of the suit
  - j. certificate of service

**Claimants Case was That :-**

2. The claimants case is that the claimant was employed by the Respondent as a day security guard.
3. The claimant was employed in October 2019 and he worked diligently up until the time that he was dismissed
4. He signed a 1 year contract that lapsed in October 2020 and from there he has never been issued an employment contract.
5. He would report to work at 6:00 AM and leave at 6:00 PM but he was never compensated for the overtime that he would put in and it forms part of his claim
6. That he worked during public holidays but was never compensated for the same
7. The claimant was paid a monthly basic salary of Ksh 14,500 as at the time that he was being dismissed and the same was deposited into her bank account.
8. The claimant was never given a pay slip in all the time that he was employed by the Respondent
9. In all the time that the claimant was employed he was never afforded house allowance.
10. As at the time that he was being dismissed he had 2 year's annual leave pending.
11. As at the time of his dismissal, the claimant was stationed at the Kenya Revenue Authority.
12. That at all material times relevant to this suit the contract of service between the claimant and the respondent was an employment contract governed and regulated by the [Employment Act](#), laws of Kenya.
13. That sometime around the end of month October 2021, the claimant together with his colleagues were in the course of performing their duties when they were informed that they had been terminated. He was simply informed that another company was taking up assignment.



14. That the Respondent's behavior prompted the claimant to seek legal counsel and a notice of intention to sue was ignored/neglected to respond to the same.

### **The Respondent's Case**

15. The respondent's case is that the claimant was employed on a one year contract
16. That the contract was dependent on a service contract with KRA
17. That when the contract ended the claimants absconded duty and only reported to the office after one week
18. That when the claimant reported to the office he opted to clear with the respondent rather than answer to the notice to show cause

### **Issues to be determined**

19.
  - a. Was the claimant terminated by the respondent and was the termination of the Claimant by the Respondent fair and lawful?
  - b. Is the Claimant entitled to the prayers in the Claim?
  - c. Who meets the costs of this cause?
20. The claimant stated in his statement that he was employed by the respondent in October 2019 and that his contract was terminated in October 2021 without reason.
21. The respondent filed a response and denied terminating the services of the claimant. The respondent in the statement of response stated that the claimant absconded duty and when issued with a notice to show cause the claimant together with others opted to clear with the respondent.

### **Findings**

22. There is no dispute that the claimant was an employee of the respondent and the only issue is whether the claimant was wrongfully terminated as such whether the claimant is entitled to the prayers sought
23. On the issue as to whether the termination of the claimant was unfair and unlawful.
24. I have considered the memorandum of claim, the evidence tendered by the claimant together with the exhibits produced herein. I have also looked at all the documents produced and the submissions.
25. As held in the case of *Jared Aimba v Fina Bank limited* [2016]eKLR Under section 45 and 41 of the *Employment Act*, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination
26. Section 41 (1) of the *Employment Act* 2007 provides that “ an employer shall, before terminating the employment of an employee , on the grounds of misconduct, poor performance or physical incapacity explain to the employee , in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
27. It was the duty of the claimant in this case to prove his case on a balance of probabilities.



28. Section 47 (5) of the *Employment Act* provides that “ 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 for the termination of employment or wrongful dismissal shall rest on the employer.
29. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya is clear on this point; the said section provides that Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
30. Section 107 (2) provides that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
31. It was the responsibility of the claimant to prove that he was terminated unfairly that is when the burden sifts to the respondent to prove that the termination was lawful.
32. In this case the claimant testified that they were working at KRA when the assignment was taken over by another company and they were not deployed by the respondent to another assignment.
33. The claimant did not prove that they went to the respondent for deployment, in fact, in cross examination the claimant stated that they only went back to the office after one week and opted to clear with the respondent.
34. To this extent the claimant admitted they absconded duty and did not report to the office for deployment to another assignment.
35. The respondent’s witness stated that they had secured another assignment at the University of Nairobi where the claimants were to be deployed but the claimants absconded work.
36. I find a lot of contradictions in the testimony of the claimant. On one hand the claimant states that they went to the office and they were told that there is no another assignment while in cross examination the claimant stated that they only went to the office after one week and opted to clear with the respondent. The court fails to know where the truth lies in the statement of the claimant
37. The claimant further stated that they never received the show cause letters nor the termination letters, it thus beats logic how the claimants concluded that they had been terminated and opted to clear with the respondent.
38. I find that the claimant was not being honest and was very mean with the truth only choosing to tell the truth when it suited him.
39. On the other hand the witness who testified on behalf of the respondent stated that the claimants absconded duty and after one week he issued the claimants with a show cause letter but the claimants chose to clear rather than go through the disciplinary process.
40. I find the respondent’s witness to be more honest and his evidence was corroborated by the evidence of the claimant who admitted that they only went back to the office after one week.
41. On the issue of unlawful termination, I find that the claimant did not prove that they were unlawfully terminated. I find that the claimants opted to clear/ resign rather than answer to the notice to show cause.
42. To that extent the claim fails for want of proof on the part of the claimant.



### **On the issue of renewal of the contract.**

43. The claimant testified that he was issued with a contract for one year only that the same was not renewed after one year to that extent I am convince that the claimant was issued with a contract and unless there were changes the same was assumed to continue unless expressly terminated. Again I find the claimant to be dishonest by asking that the respondent be punished for failing to issue him with a contract.
44. In Kenya, if a fixed-term employment contract expires and the employee continues to work without a new agreement or formal renewal, the situation can lead to the employment being considered a permanent employment contract by implication, although the general principle is that fixed-term contracts do not automatically renew upon expiry. This implies that the employee may be deemed to be a regular, permanent employee even if their initial contract was fixed-term. This is thus to the advantage of the employee and as such I do not find any reason to punish the employer in this case as failing to expressly renew the contract was to the advantage of the employee. Prayer b and c therefor fails and the same are dismissed

### **Public holidays**

45. Prayer d and e are for a declaration that the failure to pay the employees for working during public holidays was unfair labour practice.
46. It was the duty of the claimant to prove that he worked during the holidays
47. The respondent's witness stated that KRA did not require security during holidays as such the claimants did not work during the public holidays. This evidence was not challenged by the claimant and I find that the claimant did not work during public holidays consequently the prayer is dismissed

### **Salary**

48. Prayers f and g are for declaration that the claimant was paid salary below the minimum wage which amounted to unfair labour practice.
49. Though the claimant stated that he was under paid, the claimant produced a contract of employment which provided for a consolidated salary of Kshs. 14,500 which was subsequently increased to Kshs 15,000 as per the pay slips produced by the respondent which is above the gazetted minimum wages for a day security guard in Nairobi during the pendency of the contract at Kshs. 13,572.90 /=
50. I find that the claimant has not proved that he was under paid

### **Exemplary and punitive damages**

51. As submitted by the advocate for the respondent. The object of exemplary/punitive damages is to punish and deter mostly in cases involving state or government officials or where the respondent benefits excessively from the acts of commission and omission. I this case the respondent is not a government agent/employee nor as it been demonstrated that the respondent committed acts that would warrant the award of exemplary or punitive damages.

### **Maximum compensation for wrongful dismissal**

52. The claimant having failed to prove on a balance of probabilities that they were wrongfully terminated, I find that there is no basis for the award of damages for wrongful termination.



53. I have found above that the claimant voluntarily left employment when they were asked to show casus why disciplinary action could not be taken against them, I find that there is no basis for issuance of notice, the claim is thus rejected

### **House allowance**

54. While I agree with the claimant's advocates in their submissions that Section 18,26 and 31 of the Employment Act give the foundation. Section 48 (1) (a) and (b) as read with regulation 5 of the regulation of wages protective services order clearly show that house allowance is 15% of the basic salary, I do not agree that the salary in the contract is a basic salary.
55. The employment contract which is the only contract signed by the claimant is clear that the salary is a consolidated salary which include house allowance
56. I thus find that the claimant was paid a consolidated salary which include house allowance and other allowances.

### **Overtime and Holidays**

57. The claimant was to prove that he worked during public holidays, that he worked over time and that he was under paid.
58. It is the duty of the claimant to prove that they worked over and above the agreed working hours and and over the agreed working days as per the contract of employment.
59. In this case it was agreed that the working hours was from 6am to 6 pm and from Monday to Saturday as such the claimant had to prove that he worked over and above the agreed working hours and during the holidays.
60. Since the respondent proved that KRA did not require security guards during holidays and on Sundays except on special occasions, it was incumbent upon the claimant to prove the days he worked over time and on holidays.
61. As stated in the case of Patrick Lumumba Kimuyu v Prime Fuels(K) Limited [2018] eKLR the Court held that: "Whereas we appreciate that the Employment Act enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked.
62. On over time it is the duty of the claimant to prove that he worked over and above the agreed working hours as stated in the case of:-

*KUDHEIHA Workers v Charles Waitbaka Goka t/a Apple Bees Pub and Restaurant* [2013] eKLR: where the Court held that: "There is a tendency for Claimants seeking overtime pay to just throw all the public holidays in a calendar, all the hours beyond the agreed working hours on the clock, and all the years served, in the face of the Court and hope they make a credible case for overtime. Claimants of overtime must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable and factually credible system of overtime pay. The Claimant did not do this to the satisfaction of the Court."



63. I wish to associate myself with the findings in the above case and find herein that the claimant never tendered evidence to prove that he worked over and above the agreed working hours, during holidays and that he was not paid for the overtime worked.
64. The claim for overtime and public holidays was not proved as such the same are not allowed.

#### **Leave days not taken**

65. Though the claimant stated that he did not take leave, the respondent produced leave forms which prove that the claimant took all the leave days. The claimant was under duty to prove that he applied for leave and the same was denied or not approved which the claimant failed to do the same is not allowed.

#### **Severance pay.**

66. Severance pay in Kenya is paid when an employee's employment is terminated due to redundancy, which includes reasons like company restructuring, downsizing, or abolition of a job. Severance pay is a legally mandated compensation calculated at 15 days' pay for each completed year of service, in addition to other terminal dues, according to the [Employment Act](#) of 2007.
67. Redundancy is the primary circumstance for severance pay, meaning the loss of employment initiated by the employer due to the employee's role becoming superfluous.
68. In this case the claimants opted voluntarily to leave employment when they were asked to show cause why they absconded duty.
69. I agree with the advocate for the respondent that The above claim under this head is misguided and ought to fail for the reason that the claimant position was not declared redundant as envisioned under Section 40 of the [Employment Act](#). The Claimant on his own volition abandoned employment when he did not report to the Respondent offices for redeployment on 1/11/2021 then shows up after one week to return his uniform.
70. Contractual Agreements: severance pay may also be paid where the contract expressly provide for the same
71. If the employment contract or a collective bargaining agreement provides for a better severance package than the statutory minimum, the employer must adhere to those more favorable terms.
72. Severance pay is generally not provided for termination for reasons other than redundancy, although other provisions like notice pay, service pay, or compensation for unfair termination may apply in different situations

All the other claims were not proved and are disallowed.

The suit is thus dismissed.

It is trite law that costs follow the events and in this case I award costs to the respondent.

**DATED AT NAIROBI THIS 25TH DAY OF JULY 2025**

**T.M OLANDO**

**PRINCIPAL MAGISTRATE**

Judgment is delivered virtually in the presence of

CC. Miss Ngei

