



## **JUDGMENT**

1. This appeal arises from the Judgment of Hon. V. A. Adhiambo delivered on 5<sup>th</sup> March 2025 in **Kisumu CMELRC No. E069 of 2024, Neondo Mohammed v JRS Group Ltd.** Aggrieved by that decision, the Appellant lodged a Memorandum of Appeal dated 19<sup>th</sup> March 2025 setting out the following grounds:

(1) *That the Trial Magistrate erred in law and fact in determining that the Respondent was unlawfully terminated when the evidence and material on record clearly demonstrated that the Respondent left employment of his own volition and the Appellant did not substantively and procedurally unlawfully terminate the Respondent's employment.*

(2) *That the Learned Trial Magistrate erred, misdirected herself and wrongly applied the law and the governing legal principles in determining that the Respondent was unlawfully terminated by the Appellant.*

(3) *That the Learned Trial Magistrate erred in law in awarding the Respondent damages for wrongful*

*dismissal in the sum of Kshs. 152,016.50 a sum equivalent to 10 month's salary when the evidence and material before her, did not warrant the award of this magnitude.*

(4) *That the Learned Trial Magistrate erred in law in awarding the Respondent Kshs. 60,354/- as under-payment sum for the entire period of employment when the Respondent completely failed to demonstrate that he was indeed entitled to such an award.*

(5) *That the Learned Trial Magistrate erred in law in awarding the respondent a sum of Kshs. 77,097.28 as House allowance when there was absolutely no material or basis upon which she would make such an award.*

(6) *That the Learned Trial Magistrate erred in law in awarding the Respondent a sum of Kshs. 45,604.95 as House allowance when it was clear that the Respondent did not deserve the said award based on the evidence and material before Court.*

2. On the basis of these grounds, the Appellant urges the Court to allow the appeal, set aside the judgment of the Trial Court, and substitute it with an order dismissing the suit. In the alternative, it prays that the Court varies the impugned judgment accordingly and awards it costs of both the appeal and the proceedings before the Trial Court.
3. The appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant submits that the Trial Magistrate's finding that the Respondent was unlawfully dismissed lacked any evidentiary basis. It contends that the record demonstrates that the Respondent was arrested and detained on allegations of theft and, upon release, failed to resume duty. Further, it submits that although the Respondent was invited to attend a disciplinary hearing, he did not do so and instead proceeded to file suit. In these circumstances, the Appellant asserts that the Respondent failed to discharge the burden of proving that an unlawful termination occurred. It further

contends that the Trial Magistrate erred in shifting the burden of proof to the Appellant.

5. On the remedies awarded, the Appellant submits that the same were unjustified in the absence of proof of unlawful termination. In particular, it argues that the award of compensation equivalent to ten months' salary was excessive and unsupported, noting that the Trial Magistrate did not provide reasons for granting near-maximum compensation. It maintains that, even if unlawful termination had been established (which is denied), an award of three months' salary would have sufficed.
6. Similarly, the Appellant submits that the award of salary in lieu of notice was unwarranted, reiterating that it did not terminate the Respondent's employment. With regard to underpayments and leave earned but not taken, the Appellant submits that no proof was availed for the same. The Appellant also challenges the award of house allowance in the sum of Kshs. 77,097.28, submitting that it was made without any analysis or justification. In conclusion, the Appellant urges the Court to allow the appeal with costs.

## Respondent's Submissions

7. The Respondent, on his part, urges the Court to be guided by its duty as a first appellate court to re-evaluate the evidence and arrive at its own independent conclusions, while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this regard, he relies on section 78 of the Civil Procedure Act and **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**. Regarding the termination of his employment the Respondent submits that the Appellant did not prove desertion. He asserts that the onus was on the Appellant to prove desertion which it woefully failed to do. He highlights the fact that no call logs or desertion notice was produced. On that basis, he urges the Court not to interfere with the Trial Court's finding on unlawful termination. Regarding the award of ten months' salary as compensation, the Respondent submits that the same was justified in view of his long service of over 21 years. He similarly supports the award of pay in lieu of notice, contending that it was in accordance with section 36 of the Employment Act, given that his termination was effected without notice.

8. As for underpayment the Respondent submits that he was underpaid for his entire employment period. He points out that his salary progressed from Kshs. 3,000/- to Kshs. 11,500/- in 2020 and eventually to Kshs 14,000/-. He references the Regulation of Wages (General Amendment) Order 2018-2022 which prescribed Kshs. 15,201.65/-, urging the court not to interfere with the trial court's award.
9. On the award of house allowance, the Respondent submits that house allowance was not paid for the entire period of his employment. He asserts that the Appellant failed to provide a copy of his pay slip and contract in line with section 74 of the Employment Act. He urges the Court to uphold the award of Kshs. 77,097.28. As for overtime the Respondent submits that he worked from 6.00pm to 6.00am, thereby accruing four hours overtime daily. He asserts that this fact remained uncontroverted as no document was produced showing that he was paid overtime. He therefore urges the Court to grant the Kshs. 498,388.85 sought in the memorandum of claim.

10. On leave the Respondent urges the Court to award Kshs. 45,604.95 in view of the Respondent's failure to produce records. He asserts that he neither proceeded on leave nor received payment in lieu thereof. Finally, on rest days, the Respondent submits that he worked continuously for seven days a week in contravention of Regulation 8 of the Regulation of Wages (Protective Security Services) Order, 1998, which entitles an employee to one rest day per week. He therefore urges the court to award the Kshs. 95,824.40 pleaded in the memorandum of claim. On costs, the Respondent prays that they be awarded to him from the date of the Trial Court's judgment until payment in full, contending that the appeal is unmeritorious and intended to delay his enjoyment of the fruits of his judgment.

#### Disposition

11. This being a first appeal, this Court as the appellate court is obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at its own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the

Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."*

[Emphasis supplied]

12. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence the parties presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

13. The common ground is that the Appellant was the employer of the Respondent. Sometime in October 2023, there was an incident at the premises of the Appellant and the Respondent was taken into custody. The Appellant wrote a letter to the County Labour Officer on 16<sup>th</sup> October 2023 indicating that the Respondent was currently in custody and that it had not cleared the Respondent. It stated that he had failed to disclose to the County Labour Officer information that related to the criminal complaint. The Appellant indicated in the letter that it would not have further discussion regarding the Respondent until he was cleared. It was indicated that the Respondent had been availed an opportunity to fully discuss the issue at the office but he had declined.

14. Curiously, the Appellant did not avail any letter issued to the Respondent seeking the alleged explanation indicated on the letter to the County Labour Officer. There was no record of the proposed meeting, there was nothing by way of documentation from the Appellant as the employer regarding the employee who ostensibly was accused of wrong doing. The Appellant did not discharge the burden under section 43

of the Employment Act and therefore the Learned Magistrate was correct in the surmise that there was unfairness in the termination of the services of the Respondent. There is no indication that section 41 of the Employment Act was adhered to.

15. The Learned Magistrate awarded relief to the Respondent that was within her purview as the trial court. She assessed the evidence before her and came to the correct conclusion. The fact that the Respondent had served the Appellant for a very long time must have weighed heavily when calculating the remedy under section 49 of the Employment Act.

16. The Court on appeal has declined to review any of the sums awarded to the Respondent and in determination of the Appeal holds there is no relief for the Appellant who must meet the judgment of the Trial Court. Appeal is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of April**

**2026**

**Nzioki wa Makau, MCI Arb.**

**JUDGE**

Original