

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E026 OF 2025

BETWEEN

ST. MARY’S BOYS SECONDARY

SCHOOL

AND

CHILD

RESCUE

CENTRE.....APPELLANT

AND

JOSEPH NDUNG’U KANYUGUTO.....RESPONDENT

(Being an appeal against the Judgment of the Hon. Mary Gituma (C.M) delivered on 4th June 2025, in Nyeri MCELRC No. E019 of 2024)

JUDGMENT

1. The Respondent, **Joseph Ndung’u Kanyuguto**, commenced proceedings against the Appellant before the Chief Magistrate’s Court at Nyeri in *CMELRC Cause No. E019 of 2024: Joseph Ndung’u Kanyuguto v Board of Management, St. Mary’s Boys Secondary School and Child Rescue Centre*. In his Amended Statement of Claim, the Respondent averred that he was engaged by the Appellant as a security guard in or about May 2000 and served in that capacity until 1st February 2024, when his employment was terminated without notice or reason.

2. The Respondent further stated that his engagement was on successive fixed-term contracts, the last of which lapsed on 31st December 2021. Notwithstanding the expiry of the said contract, he continued to render services to the Appellant and was remunerated accordingly up to 1st February 2024, when his employment was brought to an end.
3. The Respondent's case at the trial Court was that upon reporting to work on 1st February 2024, he found that the Appellant had engaged new security guards. He was instructed by the school principal to hand over the keys to the school gate to one **Wanyama**, a farm manager, and to leave for home, as there was no work available for him. He was, however, directed to report back to the principal's office the following day.
4. It was the Respondent's further assertion that on 2nd February 2024, he was issued with a letter dated 1st February 2024 addressed to the Branch Manager of the National Social Security Fund (NSSF) in Nyeri. He expressed surprise at the contents of the said letter, stating that he had not been given prior notice of retirement. In his view, the purported retirement letter was an afterthought, allegedly prepared at the instance of the NSSF Manager when he (Respondent) visited the NSSF offices to claim his benefits.

5. It is against this background that the Respondent sought a declaratory order that his termination was unfair and unlawful, compensation for unfair termination, one (1) month's salary in lieu of notice, withheld salary for January 2024, payment for accrued leave, and release of withheld welfare contributions for two (2) years. In addition, he prayed for the costs of the suit plus interest.
6. The Appellant opposed the Claim through a Statement of Response dated 24th April 2024, contending that it was improperly sued and lacked the capacity to be sued, and therefore urged that the suit be struck out with costs.
7. The Appellant maintained that it had never employed the Respondent, asserting instead that he was employed and remunerated by the De La Salle (Christian) Brothers.
8. The Appellant further contended that the Respondent had been informed of the change in the school's management and was advised to engage the De La Salle Brothers regarding the determination of the status of his employment.
9. It was the Appellant's position that, being aware of the severance of the relationship between the school and the De La Salle Brothers, the Respondent requested for a letter to facilitate access to his NSSF benefits.

10.The Appellant also asserted that the Respondent was within his retirement age and did not raise any objection to the contents of the letter dated 11th February 2024.

11.The Appellant further stated that due to constant theft and vandalism, the school's Board of Management resolved to engage a private security firm. Former employees of the De La Salle Brothers, including the Respondent, were notified of this decision.

12.It was the Appellant's further assertion that the respondent was notified of the availability for absorption in the security firm as its employee but he opted to retire.

13.To this end, the Appellant urged the trial Court to dismiss the Respondent's suit with costs.

14.At the hearing, both parties called oral evidence, with the Respondent testifying in support of his case and the Appellant calling **Francis Njoroge** as its witness. The parties thereafter filed written submissions, after which the trial court delivered its judgment on 4th June 2025.

15. In its judgment, the trial Court found in favour of the Respondent, holding that the Appellant was indeed his employer and had the capacity to sue and be sued. The Court further found that the Respondent had continued in employment for 14 years beyond the retirement age, and that from 2022, when the Appellant took over the school, the Respondent was not requested to retire. Ultimately, the trial Court held that the termination of the Respondent's employment was unfair and that the Appellant failed to comply with Section 41 of the Employment Act.
16. The Court further found that the Respondent had worked for 14 years past his retirement age and that from 2022, when the Appellant took over the school, it did not request him to retire. In the end, the trial Court held that the Respondent's employment was unfairly terminated.
17. Accordingly, the trial Court issued a declaratory order to the effect that the Respondent's termination was unfair and unlawful and consequently awarded him compensation for unfair termination, notice pay, together with interest and costs of the suit.

The Appeal

18. Aggrieved by the findings and orders of the trial Court, the Appellant lodged the present Appeal, raising the following two (2) grounds as set out in the Memorandum of Appeal dated 23rd June 2025.

- 1) **THAT the Honourable learned trial Magistrate erred in law and fact in entering judgment against a non-legal entity in law; Board of Management St Mary's Boys Secondary School, a private school.**
- 2) **THAT the learned trial Magistrate erred in awarding five months general damages for alleged wrongful termination a figure too high in the circumstances.**

19. Accordingly, the Appellant has urged the Court to set aside the judgment of the trial court in its entirety with costs.

The Submissions

20. The Appeal was canvassed by way of written submissions. On the Appellant's part, it was submitted that the Respondent failed to exercise due diligence in ascertaining the ownership and management of the school as contemplated under **Section 2 of the Basic Education Act, 2013**. In the Appellant's view, the amendment introducing the Board of Management as the Respondent only worsened the situation.

21. The Appellant further contended that private schools do not have Boards of Management vested with the legal capacity to sue or be sued, maintaining that

such Boards are only established for public schools under Section 55 and the Fourth Schedule of the Act. It was the Appellant's argument that a private school can only be sued through its proprietors, and that in this instance, the school is owned by the Archdiocese of Nyeri.

22. The Appellant maintained that the suit cannot be maintained against a non-legal entity. In support of this position, reliance was placed on the cases of ***John Mishomoroni Academy v Yakub Shaban (2021) eKLR*** and ***Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank HCC No. 5116 of 1992 (OS)***.

23. On the other hand, the Respondent submitted that it was not in dispute that the Appellant's school is a private institution, and that it is managed and administered by a Board of Management following the exit of the De La Salle Christian Brothers as administrators in 2022.

24. The Respondent further argued that it was misleading for the school to continue using letterheads in 2024 indicating that it was still administered by the De La Salle Christian Brothers, despite having left the institution in 2022, thereby prejudicing him and any other person seeking to sue the school.

25. It was the Respondent's further submission that, unlike most private schools, the Appellant operates through a Board of Management responsible for the day-

to-day running of its affairs, rendering the circumstances of this case unique. In the Respondent's view, a reasonable person faced with such facts would have deemed it appropriate to sue the Board of Management.

26. Referencing the case of *The Registered Trustees De La Salle Christian Brothers t/a St. Marys Boys Secondary School Vs Julius D.M Baini (2007) eKLR*, the Respondent submitted that despite the Appellant's assertion that the school is owned by the Registered Trustees of the Archdiocese of Nyeri, previous suits against the school were instituted against its former administrator, specifically the Registered Trustees De La Salle Christian Brothers.

27. The Respondent further contended that he instituted the claim against the current administrators upon discovering that the De La Salle Christian Brothers were no longer in charge, and maintained that an entity with the capacity to hire and dismiss employees had the capacity to be sued.

28. The Respondent further submitted that the trial Court properly addressed the issues in controversy and determined the rights and interests of the parties before it.

29. It was the Respondent's further submission that if, as alleged by the Appellant, the school is registered under the Registered Trustees of the Archdiocese of Nyeri, then the Board of Management acts as its agent or employee, thereby rendering the said Trustees vicariously liable.

Analysis and Determination

30. As a first appellate Court, this Court is obligated to re-evaluate the evidence presented before the trial Court alongside the judgment and to arrive at its own independent determination as to whether the appeal is merited. In so doing, the Court is entitled to subject the entire record to a fresh and exhaustive analysis and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This position was articulated in *Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123*.

31. Upon reviewing the record, the rival submissions, and the applicable law, the Court has narrowed down the following issues for determination: -

- a) Whether the trial Court erred in finding that the Appellant was the Respondent's employer and had the capacity to be sued.***
- b) Subject to (a), whether the compensation awarded to the Respondent by the trial Court was excessive.***

Whether the trial Court erred in finding that the Appellant was the Respondent's employer and had the capacity to be sued

32. The Appellant's position, both before this Court and the trial Court, is that it is a private school lacking legal personality and therefore incapable of being sued.

33. Disputing this position, the Respondent contends that the Board of Management, having the authority to hire and dismiss employees, equally possesses the capacity to be sued.

34. Notably, no contract was produced by the Appellant to demonstrate any employment relationship between the Respondent and the De La Salle Brothers or the Trustees of the Archdiocese of Nyeri.

35. There is therefore no evidence on record to discount the Respondent's assertion that he was an employee of the Appellant.

36. Beyond asserting that it is a private school and a non-legal entity, the Appellant did not clarify its legal status or the nature of its existence. This uncertainty was compounded by the testimony of DW1, who, under cross-examination, stated

that he did not know whether St. Mary's School is a company, and further indicated that it is neither a partnership nor a sole proprietorship.

37. The record further indicates that DW1 testified, during cross-examination, that the Appellant is managed by a Board of Management which is responsible for hiring and dismissing employees, raising the question as to the capacity in which it exercises these functions.

38. It is also pertinent to note that **Section 2 of the Employment Act**, defines the term "employer" to mean **any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**

39. From the foregoing statutory definition, it is evident that the term "employer" is given a broad interpretation under the Employment Act so as to encompass entities and persons who may not strictly be parties to a formal contract of service.

40. This position was affirmed by the Court in ***Daniel Mutisya Masesi v Romy Madan & another [2013] eKLR***, where it was held as follows: -

"The Employment Act defines the term 'employer' expansively, and does not suggest anywhere that directors cannot be joined with their

corporate business vehicles in redressing employment wrongs. The Court looks at the whole economic enterprise, not the legal and business reincarnations behind the enterprise.”

41. In light of the foregoing, it is apparent that being the manager of the school, the Appellant Board is not completely distinct from the school in the context of an employment relationship.

42. Therefore, seeing that the capacity of the Board is largely unknown and was not disclosed by the Appellant, the Court has no reason to doubt that it was the Respondent's former employer within the meaning of **Section 2 of the Employment Act.**

43. For the foregoing reasons, the Court returns that the trial Court did not err in finding that the Appellant was the Respondent's employer and that it had the capacity to sue and sued.

Whether the compensation awarded to the Respondent by the trial Court was excessive

44. The appellant has further faulted the trial Magistrate for awarding the Respondent compensation equivalent to five (5) months' salary, arguing that it is excessive in the circumstances.

45. From the record, the trial Court observed that the Respondent had worked for the Appellant for two (2) years after taking over the management of the school. As such, the trial Court considered the length of the employment relationship in determining the compensation due to the Respondent for unfair termination.

46. Bearing in mind that the trial Court found that the Respondent's termination was unfair and unlawful, and noting that the Appellant has not challenged that finding, as well as considering the length of the employment relationship, I find no basis to interfere with the award, which in any event, is largely discretionary.

Orders

47. Ultimately, I find no basis upon which to interfere with the decision of the learned trial Magistrate. Accordingly, the instant Appeal is hereby dismissed in its entirety with costs to the Respondent.

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

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Mr. Waweru instructed by Mr. Karweru

For the Respondent

Mr. Gitahi

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