

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. E100 OF 2025

(Before D. K. N. Marete)

RAHMA AL HARTHI.....1ST APPELLANT

REHAN SHAH.....2ND APPELLANT

VERSUS

ROSE NYABOKE MOGAKA.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Statement of Memorandum of Appeal dated 10th April 2025. It is grounded as follows;

- i) The trial court erred in law and or fact by improperly shifting the burden of proof from the Respondent to the Appellants.
- ii) The trial court erred in law or facts by failing to properly and exhaustively evaluate the evidence and submissions on record.
- iii) The trial court erred in law and facts by failing to address the critical issue of whether the Respondent was unfairly terminated, contrary to the weight of the evidence adduced.
- iv) The trial court erred in law and fact by failing to address the critical issue of whether the Respondent’s employment was intermittent or continuous.

- v) The trial court erred in law and fact by failing to consider and determine the Appellant's contention that the Respondents claims for unpaid leave, house allowance and underpayments were statute barred for having been filed outside the prescribed limitation period.
- vi) The trial court erred in law and or facts by failing to make an explicit finding on whether the Respondent was entitled to service pay or not.
- vii) The trial court erred in law and or fact by holding that the Respondent had proved her case on a balance of probabilities contrary to the weight of the evidence and applicable legal principles.
- viii) The trial court erred in law and or facts by rendering an incomplete and inconclusive judgment lacking material particulars of the damages awarded thereby rendering the judgment incapable of execution.
- ix) The trial court erred in law and or fact in allowing the Respondent's claim as prayed, or at all.

The Appellant seeks the following orders of court;

- a) *That this Appeal be allowed.*
- b) *That the entire judgment of the trial court delivered on 13th March, 2025 be set aside and substituted with an order dismissing the suit with costs.*
- c) *That this court be pleased to grant such further or other reliefs as it deems fit in the circumstances.*
- d) *That the Appellant be awarded the costs of this Appeal.*

The Respondent's case before the trial court was that on or about 1st July 2007 the Appellants employed her as a house help at a starting basic salary of Kshs. 2,500 exclusive of house allowance. Her salary was reviewed periodically until it reached Kshs. 8,000 at the time of her termination. She served the Appellants diligently for approximately thirteen years until on or about 11th May 2020 when the 1st Appellant unilaterally and orally terminated her services without any notice, show-cause letter, or disciplinary hearing.

The Respondent further averred and submitted that throughout her thirteen years of service she was never provided with housing or house allowance, was never permitted to proceed on annual leave, was grossly underpaid in contravention of the prevailing Regulation of Wages (General) Orders, and that the Appellants neither deducted nor remitted NSSF contributions on her behalf.

The Appellants' case in response was that the Respondent was paid Kshs. 20,000 per month, comprising Kshs. 5,000 mid-month, Kshs. 10,000 at the end of the month, and Kshs. 200 per day as transport. They maintained that the Respondent was not terminated but left employment voluntarily following an inquiry regarding the theft of a wedding ring and that she was paid her terminal dues in cash amounting to Kshs. 43,300.00

The matter came for hearing before the trial court on 25th November 2024 when the parties testified in reiteration of their respective cases. They thereon filed written submissions in such support. The trial court, upon evaluating the evidence and submissions, found in favour of the Respondent and allowed the claim as prayed. This was with an exception of the claim for compensation for unfair termination which was reduced from twelve months to six months' salary amounting to Kshs. 93,640.80. The court also awarded costs and interest at court rates to the Respondent.

The issues for determination in this appeal therefore are;

1. Whether the trial court erred in finding that the Respondent was unlawfully and unfairly terminated.
2. Whether the learned Magistrate rendered an incomplete judgment incapable of execution.
3. Whether the trial court erred in awarding the reliefs as claimed.
4. Who bears the costs of this appeal.

The 1st issue for determination is whether the trial court erred in finding that the Respondent was unlawfully and unfairly terminated. This being a first appellate court, its duty is to evaluate the evidence on record afresh and draw its own conclusions, while bearing in mind that it did not have the benefit of observing the witnesses as they testified. This is provided for in the celebrated authority of **Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123**.

On this issue, the Appellants argued that the Respondent was not terminated but rather left employment voluntarily following an inquiry into the theft of a wedding ring. It is their further case and submission that even if the Respondent departed without following resignation procedures, no obligation arose on their part to follow termination procedures under Part VI of the Employment Act, 2007.

On a re-evaluation of the evidence, this Court finds that the trial court's conclusion was proper. This is because the Respondent testified under oath that she was orally told to pack her belongings and leave. This testimony was consistent throughout, including under cross-examination. The Appellants produced no documentary evidence in support of their position —

no resignation letter, no letter acknowledging the Respondent's departure, no record of any police report produced in evidence, no payment voucher, no M-Pesa statement, and no record of any disciplinary process initiated following the alleged discovery of the theft. The 2nd Appellant further conceded in cross-examination that he had no payment voucher and no M-Pesa statement to prove the alleged payments.

Section 74 of the Employment Act, 2007 obligates the employer to keep employment records. Failure to produce such records reasonably leads to the conclusion that whatever the employee alleges is most probably true. On this the Respondent seeks to rely on the authority of **Chic Fashions Limited v Miwa (Appeal E094 of 2023) [2024] KEELRC 700 (KLR)** which supported such position.

Again, the Appellants' testimony was contradictory in that the 1st Appellant stated that she paid terminal dues in August upon termination while simultaneously maintaining that the Respondent chose to leave. This contradiction rendered the Appellants' version lacking in credibility and therefore unreliable. Even the Appellants' hypothesis that the Respondent walked out, an employer who alleges misconduct as the basis for an employee's departure is obligated under Section 41 of the Employment Act, 2007 to issue a show-cause letter, notify the employee of the charges, afford an opportunity to be heard, and only thereafter arrive at a decision. The pursuit of a disciplinary process as required by the law is not a choice but an obligation. This was not done. Sections 43 and 45 of the Employment Act, 2007 further place upon the employer the burden of proving both the substantive reason for termination and procedural fairness.

The Appellants failed to discharge this twin burden. The termination was without a demonstrated valid and fair reason and without adherence to fair procedure. This answers the 1st issue for determination.

The 2nd issue for determination is whether the trial court rendered an incomplete judgment incapable of execution. The Appellants argued that the judgment lacked specific monetary particulars for each head of claim. In so pleading, the Appellant sought to rely on the authority of **Anglican Church of Kenya v Alfred Imbwaga Musungu [2014] eKLR and Kenya Revenue Authority v Menginya Salim Murgani**, and pointed to a discrepancy between the Respondent's pleaded principal sum of Kshs. 1,320,400.90 and the decree figure of Kshs. 1,423,041.80.

This Court has carefully examined the judgment of the trial court. The judgment is clear, succinct and conclusive. The court allowed the claim as prayed, adopting the Respondent's detailed and itemized pleaded figures set out in paragraph 16 of the Statement of Claim and adjusting only the compensation head for unlawful termination of employment from twelve months to six months.

The difference between the pleaded principal sum and the decree figure is readily explained by the costs of the suit awarded by the court and thereafter taxed by the taxing master which were incorporated into the decree in the ordinary sense of business. This is lawful and acceptable in the circumstances. This is not evidence of ambiguity or judicial delegation. It is a routine administrative function of the court registry in executing a complete judgment. The authorities relied upon by the Appellants addressed situations where trial courts made no conclusive award

at all and left quantification entirely to third parties. This is not applicable in our case. This answers the 2nd issue for determination.

The 3rd issue for determination is whether the trial court erred in awarding the reliefs as claimed. On notice pay, the Appellants contended that the Respondent was not entitled to notice pay because she left without following resignation procedures. As this Court has found, the Respondent was terminated and did not resign. Where an employer terminates employment without notice or pay in lieu thereof, section 36 of the Employment Act, 2007 entitles the employee to payment in lieu of notice. I therefore find that the award by the trial court was permissible and due.

On the eleven (11) days worked in May 2020, the Respondent testified under oath that she worked for the Appellants until 11th May 2020 and was not paid for those days. The burden thereupon shifted to the Appellants as custodians of employment and payment records under Sections 10(7) and 74 of the Employment Act, 2007 as read with Section 112 of the Evidence Act, Chapter 80, Laws of Kenya. The 2nd Appellant expressly conceded he had no payment voucher, no M-Pesa statement, and no documentary evidence of payment. The trial court was correct in awarding this claim.

On unpaid leave, house allowance, and underpayments, the Appellants challenged these awards on the grounds that the employment was intermittent and that the claims were statute-barred under Section 90 of the Employment Act, 2007. On continuity, the trial court accepted the Respondent's uncontroverted testimony of continuous service from 1st July 2007 to 11th May 2020. The Appellants produced not a single document to substantiate breaks in service.

Under Section 10(7) of the Employment Act, 2007 the burden of proving or disproving alleged terms of employment lies with the employer who fails to produce written particulars. On limitation, this Court adopts the reasoning in **Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] KEELRC 309 (KLR)** which authoritatively held that failure by an employer to make periodic payments does not constitute a continuing injury within the meaning of Section 90. Each missed payment gives rise to a separate and independent cause of action. The three-year limitation period applies.

The Respondent filed her claim on 22nd September 2021 well within three years of the end of her employment on 11th May 2020. The limitation argument is rejected. The Appellants produced no written contract, no payslips, no wage records, and no leave records. The Respondent's claims were pleaded in specific and itemized terms referencing prevailing Regulation of Wages (General) Orders. These are statutory entitlements that flow from the employment relationship itself. The trial court was correct in allowing them.

On service pay, Section 35(5) of the Employment Act, 2007 provides that where an employer has not registered or made contributions to the NSSF, an employee is entitled to service pay for each completed year of service. The 2nd Appellant expressly admitted in cross-examination that he did not pay NSSF contributions. The Appellants neither proved NSSF compliance nor produced evidence of any gratuity paid. Service pay for thirteen years was therefore correctly awarded.

On compensation for unfair termination, the trial court exercised its discretion under Section 49(1)(c) of the Employment Act, 2007 and awarded six months' gross salary amounting to Kshs. 93,640.80. This Court finds this award to be reasonable and well within the proper range of

judicial discretion, having regard to the length of the Respondent's service, the oral and summary nature of her dismissal, and the complete absence of procedural compliance by the Appellants. The Appellants have not demonstrated that the award is inordinately high or that it was arrived at on wrong principles. This answers the 3rd issue for determination.

The 4th issue is one on costs. Having failed in this appeal, the Appellants shall bear the costs of this appeal. The 4th issue is accordingly answered.

On a carefully re-evaluated the evidence on record, the written submissions of both parties and the applicable law, this Court is satisfied that the trial court correctly assessed the evidence and correctly applied the law. The grounds of appeal raised by the Appellants have not been established or demonstrated.

I am therefore inclined to dismiss the appeal and order as follows;

- i. The judgment of the trial court delivered on 13th March, 2025 in MCELRC No. E1724 of 2021 be and is hereby upheld.
- ii. Each party bears their costs of the appeal.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. S. Ng'ang'a instructed by S. Ngángá Ndung'u & Company Advocates for the 1st and 2nd Appellants
2. Mr. Onenga instructed by OCO Law & Company Advocates for the Respondent