



REPUBLIC OF KENYA



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**Jimale v AIC Malel (Appeal E036 of 2023)  
[2026] KEELRC 1201 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEELRC 1201 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
APPEAL E036 OF 2023  
MA ONYANGO, J  
APRIL 30, 2026**

**BETWEEN**

**ELIJAH SHEMI JIMALE ..... APPELLANT**

**AND**

**AIC MALEL ..... RESPONDENT**

*(Being an appeal against judgment of the learned magistrate B.K.Kiptoo,  
Principal Magistrate delivered on 29<sup>th</sup> November 2023 in  
Eldoret CMELRC No. 162 of 2024: Elijah Shemi Jimale V Aic Malel)*

**JUDGMENT**

1. The Appellant herein was the Claimant in Eldoret CMELRC No. 162 of 2024, in which he instituted proceedings against the Respondent by way of a Statement of Claim dated 28<sup>th</sup> October 2021, seeking compensation for what he alleged to be an unfair summary dismissal by the Respondent.
2. Upon hearing the parties, the trial court delivered its judgment on 29<sup>th</sup> November 2023, dismissing the Appellant's suit with costs on the basis that the Appellant failed to discharge the evidential burden of demonstrating that an unfair termination of employment had occurred.
3. Dissatisfied with the said judgement, the Appellant instituted the instant appeal vide his Memorandum of Appeal dated 20<sup>th</sup> December 2023 on the following grounds of appeal:
  - i. The learned magistrate erred in law and fact and rendered a decision that dismissed the Plaintiff's/Appellant's suit.
  - ii. The learned Magistrate erred in law and fact and failed to appreciate the proper effect and purport of the suit and arrived at a decision which is not supported by the law.



- iii. The learned Magistrate erred in law and fact and dismissed the Plaintiffs suit with costs and failed to appreciate and consider the evidence on record.
  - iv. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly analyze evidence on record and consequently misapprehended evidence on record and as such reaching a decision that is not founded in law and failed to appreciate the fact the Claimant had proved his case on a balance of probability.
  - v. The learned Magistrate erred in law and fact by misapprehending the evidence on record and applying the wrong principles of law and rendered a decision that is incompetent and not supported by evidence and law.
  - vi. The learned Magistrate erred in law and fact by misapplying the provisions of the Employment Act and rendered a decision that is incompetent and not supported by evidence and law.
  - vii. The learned Magistrate erred in law and fact by failing to appreciate the fact that the Plaintiff/Appellant was summarily dismissed from employment without any justifiable cause and reason and hence he was entitled to be compensated by the Respondent in accordance with the tenets and principles of Employment Law.
  - viii. The learned Magistrate erred in law and fact in dismissing the Plaintiff's/Appellant's suit in total disregard of the provisions of the Constitution, the Statutory Law, the Employment Law, the Case Law and the submissions tendered therein.
  - ix. The learned Magistrate erred in law by delivering the impugned judgment without notice to the parties and at the same time withholding the court file and making it difficult for the Claimant to know the outcome within the prerequisite period of time.
4. Consequently, the Appellant prays that this Appeal be allowed and the judgment given on or about 29<sup>th</sup> October 2022 be set aside and the instant suit be allowed in its entirety and/or be allowed to certain extent as this Honourable Court may deem it fit and just to allow/grant.

### **Analysis**

5. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for that.
6. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated 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.”
7. Vide his Statement of Claim dated 28<sup>th</sup> October 2021, the Claimant (now the Appellant) averred that he was employed by the Respondent on 1<sup>st</sup> September 2009 as a watchman.
8. The Claimant contended that he served the Respondent with dedication and commitment until 6<sup>th</sup> May 2020 when the Respondent summarily dismissed him unfairly and unlawfully and failed to give him his entitled dues for the services rendered.



9. It was the Appellant's case that the termination of his employment was unlawful, unprocedural, irregular, unfair and in total violation of section 45(2) of the *Employment Act*.
10. The Appellant maintained that he was not given any notice prior to his termination, that no valid reason was given for his termination from employment and also, that due process was not followed in the termination of his employment.
11. The Appellant contended that he was not paid his terminal dues which he particularized as hereunder:
  - i. Unpaid house allowance ..... Kshs 217,600
  - ii. Service benefits ..... Kshs 42,500
  - iii. One month salary in lieu of notice ..... Kshs 10,200
  - iv. Compensation for unfair termination ..... Kshs 122,400
  - v. NSSF remittance for 128 months ..... Kshs 51,200
  - vi. NHIF remittance for the 128 months ..... Kshs 64,000
  - Total ..... Kshs 507,900
12. The Appellant prayed for the following reliefs:
  - i. A declaration that the summary dismissal of Claimant from his permanent employment, by the Respondent was malicious, unlawful, unfair, unprocedural and a fundamentally violated the rights of the Claimant.
  - ii. A declaration that the Claimant was entitled to House Allowance.
  - iii. A declaration that the Claimant is entitled to one month salary in lieu of annual leave.
  - iv. A declaration that the Claimant is entitled to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF), for the period worked.
  - v. A declaration that the Claimant is entitled to his dues, compensation, damages and benefits as a result of wrongful dismissal from the employment as calculated herein
  - vi. An award of a maximum compensation of 12 months as per Section 49(1) of the *Employment Act*, Cap 226 Laws of Kenya (Act No 11 of 2007) and Section 12 of the *Employment and Labour Relations Court Act*, Cap 234 B, Laws of Kenya. (Act No 20 of 2011)
  - vii. Damages and terminal dues as per the calculations under paragraph 11.
  - viii. A Certificate of Service as per section 51 of the *Employment Act*
  - ix. Costs of this suit from the date of filing until its full determination.
  - x. The claim is allowed in entirety.
  - xi. Any other and/ or further relief as the court deems fit and just to grant.
13. The Respondent, on its part, filed a Response to the Claim dated 20<sup>th</sup> January 2022, in which it denied the averments made by the Appellant. According to the Respondent, the Claimant left employment following the Covid-19 pandemic and thereafter failed to report back to work.
14. The Respondent thus urged the court to dismiss the claimant's claim with costs.



## **The Evidence adduced**

15. At trial the Appellant testified as CW1 and adopted his witness statements recorded on 28<sup>th</sup> October 2021 as his evidence in chief. He sought for prayers as particularized in his Statement of Claim.
16. On cross examination, the Claimant stated that he was employed by the church, AIC Malel and that he never interacted with the Board of Trustees of AIC Malel.
17. On re-examination, he contended that he was paid his salary through his cooperative bank account and that he was not given notice before his employment was terminated.
18. The Respondent called Elijah Chewile, its chairman, who testified as RW1 on behalf of Solomon Chemai, whose term as Chairman had expired. The Respondent's witness adopted the witness statement of Solomon Chemai recorded on 28<sup>th</sup> February 2022 as his evidence in chief and produced the Respondent's By-Laws and Constitution as Exhibit 1.
19. After hearing the parties, the trial court delivered its judgment on 29<sup>th</sup> November 2023 dismissing the Claimant's suit.
20. It is the said judgment that is now the subject of this appeal.

## **The Appeal**

21. The appeal was disposed of by way of written submissions. Both parties filed their submissions. The Appellant's submissions are dated 8<sup>th</sup> October 2025 while the Respondent's submissions are dated 5<sup>th</sup> December 2025.

## **Appellant's submissions**

22. The Appellant submitted on the following issues:
  - i. Whether the Claimant was unlawfully, unprocedurally and unfairly dismissed from employment
  - ii. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the Memorandum of Claim
  - iii. Whether the Claimant is entitled to an award of Certificate of Service
  - iv. Whether the Claimant is entitled to any other reliefs as the Honourable Court may deem fit to grant.
23. The Appellant submits that the Respondent unfairly dismissed him from employment without adhering to the due process prescribed by law, particularly Section 35(1) of the *Employment Act*. It is his contention that a valid notice of termination ought to exceed twenty-eight (28) days and that, in his case, the termination was abrupt and communicated verbally therefore contravening Section 35(1) (e) of the *Employment Act*. In support of this position, reliance was placed on the case of Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR.
24. The Appellant further submitted that, in the Respondent's witness statement at pages 64–65 of the Record of Appeal, it was indicated that the school closed following government directives issued in response to the COVID-19 pandemic. The Appellant contends that no evidence was adduced to substantiate this assertion and that, even assuming there was a compulsory closure thereby rendering



the Claimant redundant, the Respondent was nonetheless obligated to comply with the provisions of Section 40 of the *Employment Act* by issuing the requisite notice.

25. The Appellant therefore maintains that the termination of his employment was unfair and procedurally flawed. He prayed for compensation and urged the Court to grant the reliefs sought in his Statement of Claim.

### **The Respondent's submissions**

26. In its submissions, the Respondent identified the following issues for determination.
- i. Whether the Appellant sued the right party.
  - ii. Whether the Appellant was wrongfully dismissed from duty.
  - iii. Whether the Appellant is entitled to the reliefs claimed.
  - iv. Who should pay costs.
27. On the first issue, the Respondent submitted that under Chapter VII of the Africa Inland Church–Kenya Constitution (Revised 2018) and By-Laws (2018), all property and institutions are managed by the Africa Inland Church Trustees on behalf of AIC-K.
28. While citing the case of *Kibera Blessed Academy v World Missionary Evangelism of Kenya Registered Trustees & 4 Others* [2016] eKLR, the Respondent submitted that the school is the property of Africa Inland Church – Kenya and is managed on its behalf by Africa Inland Church Registered Trustees.
29. Accordingly, it is the Respondent's submission that AIC Malel is not a legal entity capable of being sued, and if the Appellant alleges to have been employed by AIC Malel Church, then he ought properly to have instituted suit against the Trustees of Africa Inland Church – Kenya.
30. On the second issue, the Respondent submitted that employees were sent home following COVID-19 directives and that the Appellant failed to resume duty upon re-opening. It was contended that he was neither dismissed nor declared redundant.
31. The Respondent while relying on its witness statement recorded on 28<sup>th</sup> February 2022, submits that following the Government directive of 15<sup>th</sup> March 2020 ordering the closure of learning institutions, all employees were sent home and that upon the re-opening of the school, the Appellant failed to resume duty.
32. The Respondent contends that the Appellant does not state that he reported back to work upon the re-opening of the school and was turned away. It is the Respondent's case that the Appellant was neither dismissed nor declared redundant as alleged.
33. The Respondent urged the Court to find that the learned trial magistrate properly held that the Claimant failed to discharge the burden of proving that he was unlawfully relieved of his duties.
34. Lastly, on the issue whether the Appellant is entitled to compensation for unlawful termination, the Respondent submits that the Appellant is not entitled to the reliefs sought as he failed to establish that his employment was terminated unlawfully and does not meet the threshold for the award of the remedies claimed.
35. The court was urged to find this appeal to be unmerited and to dismiss it with costs to the Respondent.



## Determination

36. I have considered the Appellant's Record of Appeal and the submissions by both parties. The issues that fall for this court's determination are: -
- i. Whether the Respondent was the proper party capable of being sued
  - ii. Whether the Appellant was unlawfully and unfairly terminated from employment
  - iii. Whether the Appellant is entitled to the reliefs sought
  - iv. Who should bear the costs of the appeal.

### Whether the Respondent was the proper party capable of being sued

37. The Respondent's case is that AIC Malel Academy is not a legal entity capable of suing or being sued in its own name. It is contended that, under Chapter VII of the Africa Inland Church–Kenya Constitution (Revised 2018) and its By-Laws (2018), all property, institutions and operations are managed by the Africa Inland Church Registered Trustees on behalf of Africa Inland Church–Kenya and that any legal responsibility arising therefrom lies with the said Trustees.
38. On the other hand, the Appellant maintains that he was employed as a watchman by AIC Malel and worked in the school under AIC Malel management.
39. Ordinarily, in employment relationships, courts are guided not merely by formal institutional structures but by the actual employer-employee relationship, including the entity that exercised direction, control and supervision over the employee.
40. Generally, where an entity operates through trustees or a parent organization, and where such trustees are legally constituted to hold and manage the institution's affairs, the proper party in law is the registered trustees.
41. The foregoing notwithstanding, the Court must also consider whether the employee dealt with an ostensible employer in circumstances where the internal legal structure was not clearly disclosed to him.
42. Section 2 of the *Employment Act* defines an 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;” [Emphasis added]
43. The evidence on record shows that the Appellant worked within AIC Malel Academy as confirmed in the Respondent's witness statement dated 28<sup>th</sup> February 2022 at page 64 of the Record of Appeal. The Respondent did not adduce any evidence to show that at any time the Claimant was informed that AIC Malel was not his employer or that his employer was the Africa Inland Church Trustees Registered on behalf of Africa Inland Church–Kenya. There is no letter of appointment that was produced in court stating who the employer of the Appellant was.
44. The Respondent having been the agent of whoever the Claimant's employer was, it is properly sued in this suit, there being sufficient evidence of an employment relationship between the Claimant and the Respondent as sued. Suffice to state that the Respondent admitted in the witness statement filed in court that it employed the Claimant.
45. The Court therefore holds that the Respondent was a proper party as sued in these proceedings.



## Whether the Appellant was unlawfully and unfairly terminated from employment

46. The Appellant contends that his employment was unlawfully, unfairly and wrongfully terminated by the Respondent in breach of the provisions of the *Employment Act*. It is his case that the termination was carried out without notice, without valid and justifiable reasons, and without adherence to due process as contemplated under Sections 35 and 45 of the *Employment Act*.
47. The Respondent, on the other hand, denies that the Appellant was dismissed from employment. It is the Respondent's case that following Government directives issued in response to the COVID-19 pandemic, learning institutions were closed and employees sent home.
48. The Respondent contends that the Appellant failed to resume duty upon reopening of the institution and was therefore neither dismissed nor declared redundant.
49. Section 43 of *Employment Act* 2007 provides as follows:
- “ 43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.
50. Section 44(4)(a) of the *Employment Act* 2007 provides as follows:
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
51. The Respondent in its defence averred that the Appellant never resumed duty after school re-opened following the Covid 19 Pandemic. In essence, the Respondent's contention is that the Appellant absconded duty.
52. For an employer to successfully plead that an employee absconded duty in its defence, it is trite law that the employer must demonstrate that it took steps to find out the whereabouts of the employee. In the case of *Stanley Omwoyo Onchweri v BOM Nakuru YMCA Secondary School* [2015] eKLR the court held that the employer must demonstrate what measures were put in place to trace the employee who is alleged to have absconded duty.
53. In the instant case, there is no evidence that the Respondent sent the Appellant away following the outbreak of Covid-19 pandemic. There is no letter or other communication sending him home. There is further no evidence of a letter or other communication recalling him back to work in May 2021 as stated in the Respondent's witness statement.
54. If indeed the Appellant absconded duty, the Respondent did not tender any evidence to show the efforts it made in tracing the Appellant after he allegedly failed to report to work, or that it took disciplinary action against him for absconding duty through a formal process as set out in section 41 of the *Employment Act*.



55. In the absence of such proof, the court finds that the Respondent did not prove that the Appellant deserted duty as alleged.
56. The Court finds that the Respondent did not discharge the burden under sections 43 and 45 of the Employment Act to justify termination.
57. In the circumstances, I find that the termination of the Appellant's employment was therefore unfair and unlawful.

### **Whether the Appellant is entitled to the reliefs sought**

58. Having found that the Appellant was unfairly and unlawfully terminated from employment, he is entitled to compensation and payment of his terminal dues. In his Statement of Claim, the Appellant prayed for several remedies which I will address under separate heads.

- i. A declaration that the summary dismissal of Claimant from his permanent employment, by the Respondent was malicious, unlawful, unfair, unprocedural and a fundamentally violated the rights of the Claimant.

Having found that the termination of the Appellant's employment was unfair and unlawful, I make a declaration that the summary dismissal of the Appellant was unfair and unlawful.

- ii. A declaration that the Claimant was entitled to House Allowance; a declaration that the Claimant is entitled to one month salary in lieu of annual leave; a declaration that the Claimant is entitled to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) for the period worked; a declaration that the Claimant is entitled to his dues, compensation, damages and benefits as a result of wrongful dismissal from the employment and an award of a maximum compensation of 12 months as per Section 49(1) of the Employment Act. These prayers are addressed below.

- iii. Damages and terminal dues as per the calculations under paragraph 11.

- a. Unpaid house allowance

Under section 31 of the Employment Act, an employer is obligated either to provide reasonable housing accommodation or pay the employee a housing allowance, unless it is demonstrated that housing was provided or that the employee's salary was consolidated to include house allowance.

The Appellant's testimony was that he was not provided with housing or paid house allowance. This was not controverted by the Respondent.

The Appellant pleaded that he was employed on 1<sup>st</sup> September 2009 at a monthly salary of Kshs 5,500, which was subsequently reviewed to Kshs 7,000 after three months and later to Kshs 8,500 after six months.

The Respondent however stated that the Claimant was employed from May, 2013.

The court will adopt the date of recruitment as admitted by the Respondent as the date of employment since the Claimant did not adduce any evidence to prove he was in the Respondent's employment earlier than that date.

The Respondent did not demonstrate that the Appellant's salary was consolidated to include house allowance or that housing accommodation was provided. In the absence of such evidence, and pursuant to section 31 of the Employment Act, the Appellant is



entitled to house allowance computed at 15% of his applicable statutory basic salary throughout the period of employment.

From May 2013 to April, 2015 the house allowance at 15% per General Order under Municipalities was Kshs. 1,354 x 24 (months) = Kshs. 32,496

From May, 2015 to April, 2018 the house allowance was Kshs. 1,516 x 36 (months) = Kshs. 54,576

From May, 2018 to May, 2020 Kshs. 1,878.40 x 25 (months) = Kshs. 46,960

Total Kshs. 134,032

The Appellant is awarded Kshs. 134,032 under this head.

b. Service benefits

Section 35(6) of the *Employment Act* excludes employees who are members of a registered pension or provident fund or who are otherwise covered under the NSSF from claiming service pay. The Appellant, in his list of documents at page 12 of the Record of Appeal, annexed a National Social Security Fund (NSSF) statement of account evidencing monthly contributions during the period of employment. This document confirms that the Appellant was a contributor to the NSSF scheme during the subsistence of the employment relationship. He is therefore not entitled to this relief and the prayer is declined.

c. One month salary in lieu of notice

The Appellant's unrebutted evidence is that he was earning Kshs 8,500 per month. He is entitled to the pay in lieu of notice at the minimum wage applicable in May, 2020 plus house allowance as provided under section 35 as read with section 49(1) of the Act. I award him Kshs. 14,401.10.

In awarding the same I am guided by section 3(6) and 26 of the *Employment Act* and Section 48 *Labour Institutions Act* which provide:

*Employment Act*

Section 3(6)

Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

Section 26.

Basic minimum conditions of employment

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.



Section 48 *Labour Institutions Act*

Wages Order to constitute minimum terms of conditions of employment.

48.(1) Notwithstanding anything contained in this Act or any other written law—

- (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;
- (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

- (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
- (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

The foregoing provisions of the law are the basis for the application of the statutory minimum wage to the Appellant.

d. Compensation for unfair termination

Having found that the termination of the employment of the Appellant was unlawful and unfair, this court is clothed with jurisdiction to award compensation. Section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination. The Appellant worked for the Respondent for about 7 years. Taking into account the length of the Appellant's service and relevant factors under section 49(4) of the Act and applying the same to the facts of this case, I award the Appellant compensation equivalent to 8 months' salary at Kshs. 14,401.10 x 8 = Kshs. 115,208.80

e. NSSF and NHIF remittance for the 128 months

On the claim for unremitted NSSF and NHIF dues, this court has held in several decisions that the court cannot grant reliefs under these heads as NSSF and NHIF are statutory bodies with powers to recover unremitted monies from the employer. These prayers are therefore declined.

iv. Certificate of Service

Pursuant to section 51 of the *Employment Act*, the Appellant is entitled to a Certificate of service.



- 59. In conclusion, the judgment of the trial court dismissing the Appellant’s suit is set aside and substituted with the following:
  - i. A declaration be and is hereby made that the summary dismissal of the Appellant was unfair and unlawful.
  - ii. The Appellant is awarded:
    - a. Unpaid house allowance ..... Kshs. 134,032
    - b. One month pay in lieu of notice ..... Kshs. 14,401.10
    - c. 8 months’ compensation for  
unfair termination ..... Kshs. 115,208.80
  - iii. The Respondent shall issue a Certificate of Service to the Appellant within thirty days of this judgment.
  - iv. The Respondent shall meet the costs of the Appeal and in the lower court.

60. Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30<sup>TH</sup> DAY OF APRIL, 2026**

**MAUREEN ONYANGO**

**JUDGE**

