



**Lisutsa v Bob Morgan Services Limited (Appeal E125 of 2022)  
[2026] KEELRC 1206 (KLR) (17 April 2026) (Judgment)**

Neutral citation: [2026] KEELRC 1206 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E125 OF 2022  
DKN MARETE, J  
APRIL 17, 2026**

**BETWEEN**

**CALEB MUKABANE LISUTSA ..... APPELLANT**

**AND**

**BOB MORGAN SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Memorandum of Appeal dated the 2nd day of November 2022, filed out of time with leave of this Court. It is an appeal from the Judgment of court delivered on 1st July, 2021 in Milimani Chief Magistrate's Court, CMEL Cause No. 215 of 2018.
2. The Memorandum of Appeal sets out the following as grounds of appeal:
  - i. That the trial court erred in fact and law in holding that the Appellant's claim for severance pay and gratuity fell under Section 35(6) of the *Employment Act* and in applying Section 40 thereof.
  - ii. That the trial court erred in fact and law in failing to apply the relevant regulations governing security guards, including the award of gratuity of eighteen days per completed year and compensation of three months' salary during suspension;
  - iii. That the trial court erred in fact and law in failing to consider whether there was any exhibit on the record showing the Appellant refused to return to work vide a letter dated 21st December 2018;
  - iv. That the trial court erred in fact and law in failing to consider demand letters for reinstatement dated 24th April 2018 and 3rd July 2018 which went unanswered.
  - v. That the trial court erred in fact and law in failing to find that the alleged reinstatement letter of 21st December, 2018 was an afterthought.



- vi. That the trial court erred in fact and law in relying on extraneous evidence not directly relevant to internal disciplinary procedures.
  - vii. That the trial court erred in fact and law in failing to find that the Respondent's conduct in causing the Appellant's detention and taking his uniform constituted an unfair termination of employment.
3. The Appellant prays for orders allowing the appeal and awarding: one month's salary in lieu of notice at Kshs. 22,571.35; salary for March, April and May 2018 totalling Kshs. 67,714.05; gratuity for 22 years calculated at Kshs. 297,941.82; general damages for malicious prosecution, pain and emotional distress; 12 months' compensation for unlawful dismissal at Kshs. 270,856.80; and a certificate of service.
  4. The Appellant was employed by the Respondent in November 1996 as a security guard, a position he held for approximately 22 years. On 4th March 2018, while on duty at Acacia/Akesha Court, Kileleshwa, armed robbers confronted him at gunpoint. In the ensuing incident, the police arrested him and detained him at Kileleshwa Police Station. He was arraigned at Kibera Law Courts in Miscellaneous Case No. 56 of 2018, where no charges were ever preferred against him. On 13th March 2018, the Learned Magistrate marked the file closed and discharged all persons held. The Appellant's advocates forwarded the court order to the Respondent on 17th April 2018 with a demand for reinstatement.
  5. The Appellant submitted that upon presenting the court order, the Respondent demanded a police clearance certificate, a document which the police confirmed they do not issue. He continued reporting to his workstation during March, April and May 2018 without receiving salary or allocation of duties. In May 2018, the Human Resource Manager Mr. Dennis Michieka verbally informed him that his services were terminated. The Appellant contended that this conduct — taking his uniform while in custody, suspending him without pay, demanding an impossible document and ultimately verbally dismissing him amounted to termination that was substantively and procedurally unfair. He relied on demand letters for reinstatement dated 24th April, 2018 and 3rd July 2018 which went unanswered and on the Respondent's role in his prosecution, as demonstrating a breakdown of trust. On gratuity, he relied on the authority of *Wells Fargo Limited v Julius Ihomba Gatete* [2018] eKLR in support of the position that NSSF membership should not bar an award of gratuity.
  6. The Respondent submitted that the Appellant was at no point terminated from employment. It contended that the Appellant was lawfully suspended pending clarification of a criminal matter, which was a reasonable and proportionate response given the security-sensitive nature of its business. The Respondent maintained that upon receiving the advocates' letter of 17th April 2018, it reinstated the Appellant on 18th April 2018 and made multiple attempts to have him return to work, all of which proved unsuccessful. It relied on the Witness Statement of Mr. Dennis Michieka, who categorically denied ever verbally communicating any termination.
  7. The Respondent further relied on the letter dated 21st December 2018, written in response to a letter from the Appellant's former advocates seeking reinstatement, as demonstrating that the employment had not been terminated and that it was the Appellant who had elected not to return. The Respondent also relied on the Appellant's own *viva voce* testimony at trial where he stated that he did not go back to work because he was 'not interested.'
  8. The issues for determination therefore are;
    1. Whether the Appellant's employment was terminated by the Respondent, or whether he voluntarily abandoned his employment.



2. Whether the Appellant is entitled to the reliefs sought.
3. Who bears the costs of this appeal.
9. The 1st issue for determination is whether the Appellant's employment was terminated. This Court sits as the first appellate court and may re-evaluate the evidence and draw its own conclusions, while remaining conscious that it lacked the advantage of observing the demeanour of witnesses. This is the dictum in the authority of *Selle and Another v Associated Motor Boat Company Ltd and Others* [1968] EA 123 and *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR. The threshold for interference with findings of the trial court is well settled that this Court may only interfere where the trial court misdirected itself in law, misapprehended the facts, or reached a conclusion that is plainly wrong.
10. The trial court, upon a thorough consideration of the testimony of both parties, found that the Appellant was neither summarily dismissed nor had his services terminated by the Respondent. It found instead that the Appellant was reinstated following his acquittal but elected not to return to work. That finding was anchored in the Appellant's own viva voce testimony in which he stated unequivocally that he did not go back to work because he was 'not interested.'
11. This Court has carefully re-read the record of appeal, the evidence of the parties, the Witness Statement of Mr. Dennis Michieka, the Further Witness Statement dated 14th August 2019, the Response to the Memorandum of Claim and the letter dated 21st December 2018. This Court is satisfied that the trial court's finding was coherent, solid and in tandem with the evidence and facts of the case. It was an outcome of the respective cases of the parties. The letter of 21st December 2018 was written by the Respondent in response to correspondence from the Appellant's former advocates seeking reinstatement. Its existence and content are consistent only with a Respondent that had not terminated the Appellant's employment and was actively seeking to re-engage him. The Appellant's contention that this letter was an afterthought does not diminish its evidential weight as a contemporaneous communication that negates any inference of termination.
12. The Witness Statement of Mr. Dennis Michieka and the Further Witness Statement dated 14th August 2019 are equally telling. Mr. Michieka consistently and categorically denied communicating any termination to the Appellant. His evidence, which the trial court accepted, was that the Respondent had at all times been prepared to have the Appellant return to work.
13. The Appellant failed to adduce any documentary evidence of termination. His claim rested entirely on an alleged verbal communication by Mr. Michieka of which Mr. Michieka denied and which the trial court, having had the benefit of observing both witnesses, did not accept. The Appellant's own admission under oath that he did not return to work because he was 'not interested' is, in this Court's view, conclusive. That admission speaks directly to the Appellant's own characterisation of why the employment relationship ended. This Court finds no basis to depart from the trial court's assessment. The 1st issue is answered accordingly: the employment was not terminated and that the Appellant voluntarily abandoned his employment.
14. The 2nd issue is whether the Appellant is entitled to the reliefs sought. The claims for notice pay, compensation for unfair termination, and general damages for malicious prosecution all proceed from the premise that the Appellant was terminated from employment. Having found that no termination occurred and that the Appellant voluntarily abandoned his employment, those claims have no foundation and must fail. They fall on the wayside.
15. On the claim for suspension pay for March, April and May 2018, the trial court awarded Kshs. 67,714.00 being three months' salary. This award was not challenged by the Respondent on appeal



and the Respondent's own witness acknowledged the Appellant was not paid during this period. This Court affirms that award.

16. On gratuity, the trial court dismissed this claim on the basis that the Appellant was a member of NSSF and that by virtue of Section 35(6) of the *Employment Act*, 2007, an employee who is a member of a pension or provident fund to which the employer contributes is not entitled to a separate gratuity payment. This Court agrees with that finding. Section 35(6) of the *Employment Act*, 2007 is clear. There is no basis in law to award gratuity over and above the NSSF entitlement in these circumstances. The claim for gratuity thus fails.
17. The leave pay award of Kshs. 16,384.00 for the 2017/2018 leave year and the order for a certificate of service were correctly made by the trial court and are affirmed. The 2nd issue is answered accordingly.
18. I am therefore inclined to dismiss the appeal and order relief as follows;
  - i. The judgment of the trial court delivered on 1st July, 2021 in CMEL Cause No. 215 of 2018 is affirmed in its entirety.
  - ii. The awards of three months' salary in the sum of Kshs. 67,714.00, leave pay of Kshs. 16,384.00, and the order for issue of a certificate of service by the trial court are sustained.
  - iii. The claims for notice pay, compensation for unfair termination, gratuity, and general damages are dismissed for want of a finding of termination of employment.
  - iv. Each party shall bear their costs of this appeal.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF APRIL 2026.

D. K. NJAGI MARETE

JUDGE

Appearances:

Miss Nkirote instructed by Kabuthia Kamau & Associates Advocates for the Appellant

Mr. Njuguna instructed by Wainaina Ileri Advocates LLP for the Respondent

