

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL CAUSE NO. E016 OF 2025

(Before D. K. N. Marete)

JOYCE KAGEHA ONDEGO.....APPELLANT

VERSUS

WINGUARD SECURITY SERVICES LIMITED.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Memorandum of Appeal dated 21st January 2025. It is an appeal from the judgment of the trial court delivered on 17th December 2024 in Chief Magistrate's Court ELRC Cause No. E1215 of 2022. In this, the trial court dismissed the claim, finding that the contract lapsed by a effluxion of time and that there was no termination of the employment of the claimant.

The Memorandum of Appeal sets out 14 grounds of appeal, the substance of which is that the trial court erred in law and in fact in;

- (i) Failing to appreciate the circumstances leading to the Appellant's termination;
- (ii) Failing to consider the evidence with regard to special damages;
- (iii) Failing to apply Section 31 of the Employment Act and Regulation 5 of the Regulation of Wages (Protective Security Services) Order in respect of house allowance;

- (iv) Failing to apply Sections 27 and 28 of the Employment Act,2007 and the relevant Regulations in respect of overtime, public holidays, rest days and annual leave;
- (v) Failing to consider the Appellant's submissions on redundancy;
- (vi) Failing to consider Sections 10(7) and 74 of the Employment Act,2007 and thereby placing an unjustified burden of proof on the Appellant.

The Appellant prayed that the appeal be allowed in its entirety, the judgment of the trial court be set aside and judgment be entered in favour of the Appellant as contained in the Memorandum of Claim. They also prayed that costs of this appeal and of the lower court proceedings borne by the Respondent.

The Appellant was employed by the Respondent as a security guard from May, 2019 until October 2021 at a consolidated monthly salary of Kenya Shillings 14,500. She was stationed at the Kenya Revenue Authority (KRA) offices. The Respondent's contract with KRA came to an end on 31st October, 2021. The Appellant testified at page 27 of the record of appeal that she was informed by the Human Resource Officer, Madam Veronicah, that her services had been terminated as a new security firm was taking over the assignment and there was nowhere to re-deploy her. The Respondent's own witness, Caleb Otieno, testified at page 46 of the record that one, Veronicah communicated to the Appellant and others that their services had not been terminated and that they were asked to come to the office for re-deployment. The Appellant instead reported to another employer on 1st November 2021.

The Appellant submitted that the appropriate legal mechanism upon loss of the third-party contract was redundancy under Section 40 of the Employment Act, 2007. It is their case that the Respondent had no selection criteria, gave no notification to the labour office or to the Appellant and did not comply with the mandatory requirements of Section 40, thereby rendering the termination unfair within the meaning of Section 45.

They sought to buttress their case by relying on the authority of **Cargill Kenya Limited v Mwaka and 3 Others [2021] KECA 115 (KLR)** and **Francis Maina Kamau v Lee Construction [2014] eKLR**. On the issue of burden of proof, the Appellant relied on Section 10(7) of the Employment Act, 2007 which places the burden of proving or disproving an alleged term of employment on the employer where the employer fails to produce a written contract or written particulars and on Section 74, which obligates the employer to keep employment records, submitting that the Respondent produced records on termination and leave but withheld records on overtime, rest days, public holidays and NSSF deductions.

The Respondent submitted that the appeal was incompetent as no certified copy of the decree was annexed as required under Rule 15(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. In reliance on the authority of **Bwana Mohammed Bwana v Silvano Buko Bonaya and 2 Others [2015] eKLR**, the Respondent urges this Court to strike out the appeal. The Respondent further submitted that the trial court was correct in finding that the contract simply ended; that the Appellant admitted during cross-examination that her last day on duty was 31st October 2021 when the KRA contract came to an end and that she reported to another employer on 1st November 2021. Therefore the claims for unlawful termination, redundancy, compensation and

notice pay did not arise. The Respondent further submitted that the Appellant bore the burden of proving her claims on a balance of probabilities, that no complaint was raised during the course of employment, a claim for overtime and public holidays over nearly three years without rest was neither feasible nor humanly possible.

The issues for determination in this appeal therefore are;

1. Whether the trial court erred in finding that the Appellant's employment came to an end without wrongful or unfair termination.
2. Whether the trial court erred in dismissing the Appellant's claims for special damages, house allowance, overtime, public holiday pay, annual leave and underpayment.
3. Who bears the costs of this appeal.

The 1st issue for determination is whether the trial court erred in finding that the Appellant's employment came to an end and was bereft of wrongful or unfair termination. This Court is guided by the principles in **Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123 and Okeno v Republic [1972] EA 36**, that a first appellate court must reconsider and re-evaluate the evidence afresh and draw its own conclusions, though bearing in mind that it did not have the advantage of seeing and hearing the witnesses.

On the Respondent's objection that the appeal is incompetent for want of a certified copy of the decree, this Court finds that objection without merit. Rule 15(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that a Memorandum of Appeal be accompanied by a certified copy of the judgment or ruling appealed against and not necessarily of the decree. Non-compliance with procedural rules of this nature is a curable irregularity under Rule 3(2) of

those Rules and striking out a substantive appeal on this basis would occasion injustice disproportionate to any procedural shortcoming. The objection is overruled.

The Respondent's own witness, Caleb Otieno, testified at page 46 of the record of appeal that one, Veronicah, communicated to the Appellant and others that their services had not been terminated and that they were asked to come to the office for redeployment. This testimony is materially inconsistent with the Respondent's own pleaded defence of desertion and inconsistent with the trial court's finding that the contract simply ended. The loss of a client contract does not automatically extinguish the underlying contract of service between an employer and an employee. Where an employer is unable to redeploy an employee following the loss of a third-party contract, the appropriate legal mechanism is redundancy as provided under Section 40 of the Employment Act, 2007. Section 2 of the Act defines redundancy as the loss of employment by involuntary means through no fault of an employee, involving termination at the initiative of the employer where the services of an employee are superfluous.

Section 40(1) of the Employment Act, 2007 imposes mandatory procedural requirements prior to termination on account of redundancy: notification to the relevant trade union and the local labour officer not less than one month prior to the intended termination; application of fair selection criteria; payment of notice or pay in lieu thereof; and payment of severance pay at the rate of not less than fifteen days' pay for each completed year of service. In **Cargill Kenya Limited v Mwaka and 3 Others [2021] KECA 115 (KLR)**, the Court of Appeal reaffirmed that a valid defence to a claim for unfair termination based on redundancy requires proof that the reason is valid and fair based on operational requirements and that employment was terminated in accordance with fair procedure. In the authority of **Francis Maina Kamau v Lee Construction [2014] eKLR**, it was

held that where an employer declares redundancy, the conditions in Section 40 of the Employment Act, 2007 must be observed and failure to do so renders the termination unfair within the meaning of Section 45.

In the present case, the Respondent did not notify any trade union or the local labour officer, applied no selection criteria, gave no notice or pay in lieu, and paid no severance pay. The trial court accordingly fell into reversible error. The termination of the Appellant's employment was procedurally and substantively unfair, in violation of Sections 41, 43 and 45 of the Employment Act, 2007. This answers the 1st issue for determination.

The 2nd issue for determination is whether the trial court erred in dismissing the Appellant's claims for special damages, house allowance, overtime, public holiday pay, annual leave, and underpayment. Section 10(7) of the Employment Act, 2007 provides that where an employer fails to produce a written contract or written particulars, the burden of proving or disproving an alleged term of employment lies with the employer. Section 74 obliges employers to maintain employment records. In **Abigael Jepkosgei Yator and Another v China Hanan International Co. Ltd [2018] eKLR**, the court observed that where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as true. The Respondent produced only a single payslip dated October 2021 and a copy of the employment contract which did not disclose actual working hours or house allowance as a separate component. The trial court erred in dismissing the special damages claims on the ground that the Appellant had not proved them when the statutory burden under Section 10(7) had shifted to the Respondent.

On house allowance, Section 31 of the Employment Act, 2007 places a mandatory obligation on employers to provide reasonable housing accommodation or pay house allowance. Regulation 5 of the Regulation of Wages (Protective Security Services) Order provides that an employee not provided with free housing shall be paid housing allowance at 15% of the basic minimum monthly wage. At the material time the statutory minimum wage for a day watchman was Kenya Shillings 13,572.90, and 15% thereof amounts to Kenya Shillings 2,035.94 per month. The Appellant was paid a consolidated salary of Kenya Shillings 14,500, being only Kenya Shillings 927.10 above the minimum wage, which does not satisfy the mandatory statutory rate. This Court awards house allowance at Kenya Shillings 2,035.94 per month for 30 months, amounting to Kenya Shillings 61,078.20.

On overtime, the Appellant's uncontroverted evidence was that she worked 12 hours per day over six days per week. The Respondent's own witness statement at page 45 of the record does not dispute these hours and no questions were put during cross-examination to challenge them. Regulation 6 of the Regulation of Wages (Protective Security Services) Order prescribes a normal working week of 52 hours spread over six days and Regulation 7 provides for overtime pay at one and a half times the normal rate. The Appellant worked 72 hours per week against the prescribed 52, an excess of 20 hours per week. Basic hourly rate: Kenya Shillings $13,572.90 \div 26 \div 8 =$ Kenya Shillings 65.25. Overtime rate: Kenya Shillings $65.25 \times 1.5 =$ Kenya Shillings 97.88 per hour. Overtime per week: 20 hours \times Kenya Shillings 97.88 = Kenya Shillings 1,957.60. Total for 130 weeks: Kenya Shillings 254,488.00.

On public holidays, the Appellant's uncontroverted testimony was that she worked during public holidays and was never compensated. Regulation 9 of the Regulation of Wages (Protective Security

Services) Order provides for double pay on public holidays. The claim of 32 days — 10 in 2019, 12 in 2020 and 10 in 2021 — was not challenged mathematically or evidentially. The daily rate is Kenya Shillings $13,572.90 \div 26 = \text{Kenya Shillings } 522.03 \times 2 = \text{Kenya Shillings } 1,044.06$. Total: $32 \times \text{Kenya Shillings } 1,044.06 = \text{Kenya Shillings } 33,409.92$. On annual leave, the Respondent adduced evidence that the Appellant took 21 days' annual leave in 2020 and 2021, which is accepted. However, no evidence was adduced of leave taken or compensated for the period May 2019 to May 2020. Leave pay for that period: $21 \text{ days} \times \text{Kenya Shillings } 522.03 = \text{Kenya Shillings } 10,962.63$. On underpayment of basic salary, the Appellant was paid Kenya Shillings 14,500 per month, which exceeds the statutory minimum wage of Kenya Shillings 13,572.90. No underpayment of basic salary is accordingly established. This answers the 2nd issue for determination.

Under Section 35(1)(c) of the Employment Act, 2007 the Appellant is entitled to notice pay. The Appellant served for approximately 2 years and 5 months from May 2019 to October 2021. Notice pay: Kenya Shillings 14,500.00. Severance pay under Section 40(1)(g) for 2 completed years of service: $\text{Kenya Shillings } 14,500 \div 26 \times 15 \times 2 = \text{Kenya Shillings } 16,730.77$. On compensation for unfair termination under Section 49 of the Employment Act, bearing in mind the circumstances of the termination, the Appellant's length of service of approximately two and a half years, the failure to comply with the mandatory requirements of Section 40, and the fact that the Appellant secured alternative employment immediately on 1st November 2021, this Court awards six months' gross salary: $\text{Kenya Shillings } 14,500 \times 6 = \text{Kenya Shillings } 87,000.00$.

The 3rd issue is as to costs. Having succeeded in this appeal, the Appellant is entitled to the costs of this appeal and of the proceedings before the trial court, which shall be borne by the Respondent.

The 3rd issue is answered accordingly.

I am therefore inclined to partially allow the appeal and order relief as follows;

- i. The judgment and decree of the Chief Magistrate's Court at Nairobi delivered on 17th December, 2024 in ELRC Cause No. E1215 of 2022 is hereby set aside.
- ii. A declaration is hereby issued that the termination of the Appellant's employment by the Respondent was wrongful and unfair.
- iii. One (1) months' salary in lieu of notice.....Ksh.14,500.00
- iv. Six (6) months' salary as compensation for unlawful termination of employment
Ksh.14,500.00 x 6 Ksh87,000.00
- v. Severance pay.....Ksh.14,500.00x2x15/30.....Ksh14,500.00
- vi. House allowance for 30 monthsKsh.61,078.20
- vii. Overtime for 130 weeksKsh.254,488.00
- viii. Public holidays for 32 daysKsh.33,409.00
- ix. Annual leave for May 2019 to May 2020, 21 daysKsh.10,962.63
- x. Total of claim/AwardKsh475,937.83**
- xi. Interest at court rates from the date of this judgment of court till payment in full.
- xii. The costs of this appeal and the proceedings before the trial court shall be borne by the Respondent.

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

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Wetaba instructed by Wetaba Were Associates Advocates for the Appellant
2. Miss Mwangi holding brief for Kathambi instructed by Kathambi Rwito & Company Advocates
for the Respondent