

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E019 OF 2024

STELL MAKERS LIMITED.....APPELLANT

-VERSUS

LINUS NYONGESA KWOPA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B. Ojoo (CM) delivered on 7th November, 2024 in Mavoko MCELRC No. 10 of 2020)

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. B. Ojoo (CM) delivered on 7th November 2024 in Mavoko MCELRC No. 10 of 2020 filed a Memorandum of Appeal dated the 4th of December 2024 seeking the following orders: -

- a) This appeal be allowed
- b) The whole judgement of the Honourable Barbara Ojoo (Mrs.) Chief Magistrate and dated 7th November, 2024 be discharged and set aside.
- c) The respondent's claim be dismissed in totality.

d) The appellant be awarded costs of this appeal and in the lower court.

e) Any other orders as may be just and equitable in the circumstances.

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in fact and in law by failing to consider the appellant's evidence and submissions on points of law and fact and in finding that the appellant unlawfully dismissed the respondent.
3. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to unpaid salary as prayed without giving neither legal basis nor quantification over said head.
4. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to unpaid leave for the period 2003-2007 and ignoring the statutory limitation of time with respect to continuing injuries.
5. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to twelve (12) months' compensation for unfair termination and by failing to take into account the principles of making an award of compensation as set out under the law.
6. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to service/gratuity pay as prayed yet the respondent was the beneficiary of remittances through the NSSF social security scheme during his period of employment.

7. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to overtime for the period 2003-2007 and ignoring the statutory limitation of time with respect to continuing injuries.
8. The Honourable Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the appellant.
9. The Honourable Magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the appellant and instead relying on the authorities cited by the respondent.
10. That in the totality of the circumstances of the claim, the findings of the learned magistrate are unsupportable in law or on the basis of the evidence adduced.

BACKGROUND TO THE APPEAL

11. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 3rd February 2020 seeking the following orders: -
 - a) A declaration that the termination of the Claimant's employment was unlawful and unfair.
 - b) An order for the Respondent to pay to the Claimant his due terminal benefits and compensatory damages as pleaded.
 - c) Costs and interests of the suit.

d) Any other relief that this Honourable Court may deem just and fit to grant.

(pages 4-6 of Appellant's ROA dated 26th September 2025).

14. In support of the claim, the Respondent filed his list of documents dated 3rd February 2020 with the bundle of documents attached; witness statement of even date; and list of witnesses of even date (pages 8-21 of ROA).
15. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 18th October 2023 (pages 22-24 of ROA). The Appellant also filed a list of witnesses dated 20th March 2024; witness statement of LYDIA ODONGO dated 20th March 2024; and a list of documents of even date with the bundle of documents attached (pages 25-35 of ROA).
16. The Claimants/Respondent's case was heard on the 2nd of May 2024 with the Claimant/Respondent testifying. He relied on his filed witness statement as his evidence in chief and produced the documents attached to the Claimants' list of documents as exhibits. He was cross-examined by counsel for the Appellant, Mr. Owino (pages 89-92 of ROA).
17. The Appellant's case was heard on 25th July 2024 with the Appellant calling one witness: LYDIA ODONGO. She relied on her filed witness statement as her evidence in chief, and produced the Appellant's documents attached to their list of documents as exhibits. The witness was cross-examined by counsel for the Respondent Mr. Mutavi (pages 92-96 of ROA).
18. The parties took directions on filing of written submissions after the hearing, and complied.

19. The Trial Magistrate Court delivered its judgment on the 7th of November 2024, allowing the Claimant/Respondent's claim in its entirety; plus costs of the suit and interest (Judgment at pages 101-105 of ROA).

DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

21. The Appellant, in their submissions dated 30th January 2026, identified the following issues for determination:-

- i. Whether the Trial Court erred in law and in fact by finding that the Appellant unlawfully dismissed the Respondent.
- ii. Whether the Trial Court erred in law and in fact by awarding the Respondent unpaid salary and PILON as prayed.
- iii. Whether the Trial Court erred in law and in fact by awarding the Respondent unpaid leave as prayed.
- iv. Whether the Trial Court erred in law and in fact by awarding the Respondent twelve (12) months' compensation.
- v. Whether the Trial Court erred in law and in fact by awarding the Respondent service pay as prayed.
- vi. Whether the Trial Court erred in law and in fact by awarding the Respondent overtime pay as prayed.

22. On his part, the Respondent identified the following issues for determination in his submissions dated 10th February 2026:
- i. When was the Respondent employed by the Appellant.
 - ii. Whether the termination from employment was unfair/unlawful or whether the Respondent absconded duty.
 - iii. Whether the Respondent is entitled to the reliefs sought.
 - iv. When was the Respondent employed by Appellant.
23. The court on review of the issues addressed by the parties was of the considered opinion the issues for determination in the appeal to be-
- a. whether the trial court erred in fact and law in finding unfair termination
 - b. whether the trial court erred in fact and law in the remedies awarded

Whether the trial court erred in fact and law in finding unfair termination

24. The ground of appeal under the issue was- The Honourable Magistrate erred in fact and in law by failing to consider the appellant's evidence and submissions on points of law and fact and in finding that the appellant unlawfully dismissed the respondent.
25. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must*

reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

26. The respondent's claim for dismissal was as pleaded in paragraphs 6 and 7 of the claim -'6. *The claimant avers that upon questioning the respondent about the unpaid salaries, he was sent on a 21-day leave, i.e. from 26.7.2019 to 20.8.2019. On 21.8.2019 the claimant reported to work as expected but was verbally terminated from employment on claims that the company no longer needed his services. His April and May 2019 salary was later paid.*

7. The claimant states that the respondents' action to dismiss him was unlawful/unfair. 5 unprocedural and offended the express provisions of the constitution of Kenya 2010,-- the employment Act 2007 and the tenets of fair labour practice; this is because. 8. a) The claimant had done absolutely nothing wrong to warrant his dismissal/ termination. b) No hearing ever took place before the decision to dismiss/ terminate the claimant was reached. c) No plausible reason was given to the claimant before the decision to dismiss him was reached. d) The decision to dismiss the claimant was harsh, unwanted, inhumane and unjustified considering the claimant had served the respondent without blemish for over 16 years.''(page 5 of ROA)

27. The defence was that the respondent had absconded as stated in paragraphs 6,7 and 8f of response thus –*‘Paragraph 6 of the memorandum of claim is denied and the claimant is put to strict proof thereof. Upon the lapse of the claimant's leave period, he was due back to work on 20th August, 2019 but he failed to show up on the material day. The claimant was not verbally terminated as claimed in his pleadings. Further to paragraph(s) 5 & 6 in the foregoing, the claimant absconded work effective 21st August, 2019 and failed to return to the respondent's premises thereafter to clear with Human Resources (HR) and collect his final dues. The respondent denies paragraph 7 of the memorandum of claim in toto and the claimant is put to strict proof thereto. The respondent reiterates the content of 2. 9. 10. paragraph(s) 5 & 6 in the foregoing and states that it is not liable to the claimant for the offence of unlawful termination. The claimant absconded work of his own volition leaving the respondent with no choice but to terminate the claimant's employment after the fact and pursuant to the dictates of the law.’*(page 22-23 of ROA).
28. In support of the defence of absconding, the appellant produced a letter to the respondent dated 9th October 2019 stating the respondent had failed to report work on 21st August 2019 as expected. The letter was received by the country labour officer on 15th October 2019. (page 32 of ROA) The appellant further produced a letter of termination dated 23rd October 2024 to the county labour officer and which stated it forwarded terminal dues of the respondent . It was received by the county officer on the 24th October 2019.(page 33 of ROA)
29. During cross-examination, the respondent told the court he was to resume from leave in August 2019. Mr. Tur told him to fill out for compulsory leave. He asked Mr. Tur about unpaid salary arrears. He returned to work on 21/8/2024. He was not working for any other company. Steel makers made some payment to the labour office. He was not paid for

unutilized leave and overtime. The company was left with his documents. In re-examination, the respondent told the trial court he was sacked on the 21st August 2019.

30. Conversely, the witness for the appellant during cross-examination told the trial court as follows- *‘I am familiar with this claim. It is not true he reported to work on 21/8/2019. He claims he met with Mr. Tur on that day and that he was terminated verbally. That is not true. The Claimant has not mentioned me in his statement. I work in the HR Department. M.r Tur is not a witness in this case. (Referred to D. Exh. 1 - Leave Application Form). It was an application for Annual Leave. He had some 18 days leave carried forward. I have not attached proof of leave from 2003-2007. (Referred to D. exh. 2). This is a Memo to all employees of the company. The Claimant was aware of the rules on absenteeism. The Claimant was aware of the repercussions of Absenteeism (Referred to letter dated 9/10/2013-D. Exh. 3). Q: Who is the letter addressed to? A: Linus Q: Is the letter acknowledged by the employee? A: The Claimant did not show up to acknowledge the letter. There is no proof of acknowledgement of the letter by Claimant. We went a copy of the same to the labour officer, Nairobi. The Respondent is based in Athi River. I am aware there is a labour office in Athi River. The operations of the payroll is in Nairobi. That is why we served the labour office, Nairobi. (Referred to D. exh. 4). This letter and cheque was sent to labour officer, Nairobi. The cheque was for Kshs.68,546/=.* It is true the tabulation for the amount was not attached. I cannot confirm that Linus received the cheque. I am not able to confirm if the money was debited from our account. It is true Linus said he did not receive the cheque. We have security guards within our premises 24/7. We have a record book at the guard. I am not aware that Claimant came to work at 21/8/21. I have not availed the gate book as evidence.’” During re-examination the appellant’s witness stated as follows- *‘ I joined the company in 2025. I have access to all employee records even those pre-*

dating 2015. My JDS includes management of records, hiring and firing employees, etc. Mr. Tur has no hire and fire powers in the company. The Claimant was not terminated. He took leave on 26/8/2019 and was supposed to resume on 21/8/2019. He never showed up and he did not inform the company of his whereabouts. He extended his absence for over 10 days and he was completely unreachable. So the company dismissed him on 9/10/2019. (Referred to D. Exh. 2). The Claimant received and signed the letter on 9/11/2019. It was a memo to all staff. (Referred to D. Exh. 3.). We tried to reach Linus on the contacts he left with us to no avail. We put all documents in place and he never showed up to sign his dismissal letter. Our HQ is in Nairobi. Our plants are in Kisumu, Athi River and Mazaras Mombasa.’’ (proceedings at pages 90-96 of ROA)

31. *The trial court held as follows- ‘15] The Claimant averred that prior to his termination, he was neither issued with any notice to show cause why his services should be terminated nor was he called for any disciplinary hearing. DWI confirmed this fact and stated that the claimant was terminated about 10days or so after he allegedly failed to resume work from leave on 21.08.2019. During cross-examination DWI was hard-pressed to explain whether the respondent made any efforts to trace the Claimant to enable them to conduct disciplinary hearing. The witness simply glossed over the issue by stating that the claimant failed to return to them to enable them serve him with any document. The termination letter was sent to the Labour Office, Nairobi instead. [16] It is imperative to state that the Claimant denied ever receiving any notice and the termination letter from the Respondent. The letter purportedly bears the address of the claimant as "P. O. BOX 107 KITENGELA" but for an unexplained reason, it was sent to the Labour Office Nairobi. In my view, it is not enough for the respondent to state that it wrote a letter to the employee. It must demonstrate to the requisite standard that*

indeed the letter left its address to the employee. In essence service of the alleged letter or communication must be proved. Proof of service could entail evidence of postage like a certificate of postage, an extract of a postage register for the relevant day, a statement or affidavit by the person who posted the letter, for example. In *Peter Ngunjiri Kariuki vs Board of Management Magomano Secondary School [2022] eKLR* it was held; "It is not enough for a party to make an allegation and expect the court to find in its favour without substantiating such an allegation and supporting the same with oral and or documentary evidence." [17] There is no doubt that the procedure as provided for under the Act was not adhered to at all owing to the approach the Respondent gave the matter. It isn't difficult therefore to conclude that the claimant's termination was procedurally unfair. [18] Further section 43 of the Employment Act places a duty upon the employer to prove the reason[s] for the termination of an employee's employment. A further burden is bestowed upon the employer under section 45 of the Act to prove that the termination was valid and fair. [19] It was the claimant's evidence that he returned to work on 21.08.2019 and Mr. Toor told him his services were no longer required at the company. That on several occasions, he tried to get back to the workplace, even to claim his dues but the guards couldn't let him in. He denied that he absconded work as alleged by the respondent. As stated earlier the Respondent's witness did not bring out any evidence to demonstrate the efforts that the Respondent made to reach out to the Claimant if at all he absconded duty as it alleged. No evidence was led towards establishing the efforts. What is discernible from the evidence of DW1 the Respondent as an employer was ignorant of what the law required of it in such circumstances. It is thus a finding of the court that contrary the Respondent's assertion, the Claimant did not abscond duty to 10 [20] Consequently, I find that the termination of the Claimant's employment was substantively unfair. I am fortified in this finding by the decision in *Mariita vs Leading Locks & Access System (Cause 2407 of 2017)*

[2022] KEELRC 1194 (KLR) where Court held that; "Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal as held in the Ronald Nyambu Daudi vs Tornado Carriers Limited Cause No 236 of 2016..... The law is that an employer alleging desertion against an employee and putting them on notice that termination of employment on this ground is under consideration must show efforts made towards reaching out to the employee and making it clear that termination is being considered on that ground.''

32. The court, on re-evaluation of the evidence before the trial court(see Selle above), established that the reason given by the appellant for termination was absconding. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.''
- To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR). Absconding is tantamount to being absent from work without permission but with no intention to return. Such conduct amounts to gross misconduct

and is a ground for summary dismissal under section 44 (1)(a) to wit- ‘ a)without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;’’

33. In the event of suspecting employee has absconded the employer must then comply with the provisions of section 41(2) of the Employment Act to wit- ‘Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.’ It was not in dispute in the instant case that the employer did not issue a notice to the employee to notify of the intention to terminate the service on the basis of absconding. The only letter before the court was of summary dismissal dated 9th October 2019. The letter was fait accompli. In Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR the Court held that an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. (see also Wilson Kibande Abai v Kenya Tents Limited [2019] eKLR and Obonyo v Kibos Sugar & Allied Industries [2024] KEELRC 1392 (KLR)) There was no demonstration of any effort to reach the respondent before the decision for termination. The witness for the appellant was not in office at the time of termination. He relied on documentation. The only document was the letter of summary dismissal titled,- ‘Desertion of employment’.(page 32 of ROA) The position of the respondent that he reported back on 21st August 2019 on expiry of leave, and his services were verbally terminated, was not shaken. It was not in dispute that the respondent was required to report back on 21st August 2019. The appellant could have called the said Mr. Tur who was dealing with the respondent as a witness. There was no reason disclosed as to why he

was not a witness, yet he was mentioned by the respondent, as being the one who asked the respondent to proceed on leave after the claim for salary arrears. Further, in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94: *“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”* I find the decision of the trial court was based on the evidence before the court and was sound in law hence no basis to interfere with the decision. The court upheld the finding of unfair termination.

Whether the trial court erred in reliefs awarded

34. The trial court held as follows- *‘What relief(s) is available to the Claimant [21] Having found the termination of the Claimant unfair for want of fair procedure and substance, I find in favour of the Claimant and hold that he is entitled to the reliefs sought. [22] Therefore, I enter judgement for the Claimant against the Respondent as enumerated in paragraph 8 of the Memorandum of Claim herein. Who bears costs hereof [23] In Jasbir Singh Rai & 3 others vs Tarlochan Signh Rai & others [2014] eKLR it was held that - "..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case." [24] The Claimant is awarded costs of this suit and interest from the date of this judgement. [25] Judgement accordingly’.* (page 109 of ROA)

35. In Paragraph 8 of the claim it was stated as follows-

*'8. a) The claimant had done absolutely nothing wrong to warrant his dismissal/ termination.
b) No hearing ever took place before the decision to dismiss/ terminate the claimant was reached. c) No plausible reason was given to the claimant before the decision to dismiss him was reached. d) The decision to dismiss the claimant was harsh, unwanted, inhumane and unjustified considering the claimant had served the respondent without blemish for over 16 years. The claimant avers that the actions of the Respondent have subjected him to loss, harm and damage and now claims as calculated hereunder.*

i. Unpaid salary (June 2019 to 21.8.2019) --Kshs. 154,512/=

ii. Unfair termination- 12 month's salary (12x 55,032/=)-

iii. One month's salary in lieu of notice- -Kshs. 154,512/=

*iv. Unpaid/untaken leave (April 2003 to August 2007) (Kshs. 55,032/= x4years x21/30) -
Kshs. 154,089/=*

*v. Service/gratuity pay for the entire period of service (18/30 x55,032/= x 16years) --Kshs.
528,307*

*vi. Overtime; (April 2003 to August 2007 = 4 years x52 Saturdays in each year = 208
Saturdays x 3 hours every Saturday 624 hours @ kshs. 397/= per hour (1.5 rate). .Kshs.
247,7281-*

vii. Certificate of service .''

36. The grounds of appeal under the awards were –

a. On salary arrears- The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to unpaid salary as prayed without giving neither legal basis nor quantification over said head. The applicant stated he was not paid a salary for June to 21st August 2019. There was no evidence that the cheque alleged to have been delivered to the labour officer was received by the respondent or even cashed. He who alleges proves. I find no basis to interfere with the item of salary arrears.

37. Unfair termination- 12 month's salary (12x 55,032/=)- The ground of appeal was -The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to twelve (12) months' compensation for unfair termination and by failing to take into account the principles of making an award of compensation as set out under the law.. The appellant submitted the Trial Court erred in law and in fact by awarding the Respondent the maximum compensation allowable by law - the Hon. Trial Magistrate failed to explain the justification in making the said determination and also failed to take in account the principles of making an award as laid out in Section(s) 49 & 50 of the Act. The Court found the trial court failed to apply criterial under section 49(4) of the Employment Act to wit- *'A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—(a)the wishes of the employee;(b)the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and(c)the practicability of recommending reinstatement or re-engagement;(d)the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e)the employee's length of service with the employer;(f)the reasonable expectation of the employee as to the length of time for which his employment with that employer might have*

continued but for the termination;(g)the opportunities available to the employee for securing comparable or suitable employment with another employer;(h)the value of any severance payable by law;(i)the right to press claims or any unpaid wages, expenses or other claims owing to the employee;(j)any expenses reasonable incurred by the employee as a consequence of the termination;(k)any conduct of the employee which to any extent caused or contributed to the termination;(l)any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and(m)any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.” The court as the 1st appellate court (See Selle above) proceeded to apply the foregoing criteria. The employee did not contribute to the termination. He was engaged in 2007, and termination occurred in 2019. That was approximated 21 years of service. The court, taking into account the above, finds no basis to interfere with the maximum award.

38. Service/gratuity pay for the entire period of service (18/30 x55,032/= x 16years) Kshs. 528,307. The ground of appeal was –‘The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to service/gratuity pay as prayed yet the respondent was the beneficiary of remittances through the NSSF social security scheme during his period of employment.’ The appellant submitted that the Trial Court erred in law and in fact by awarding the Respondent service/gratuity pay . Section 35 (6) of the Employment Act disentitles an employee from double payment of social security benefits from NSSF and a service pay scheme. The Respondent is on record as having been the beneficiary of NSSF remittances during his tenure of service. On the issue of whether he was entitled "severance pay/gratuity pay" the Respondent in his own submissions (page 40 of the record) at para 2 states that, "the claimant wishes to abandon this prayer based on the legal position that

severance is only payable on a redundancy and that gratuity is only payable if contractually provided for....." The Hon. Trial Magistrate clearly did not interrogate this head even going against the Respondent's wish to abandon the said prayer. On this I agreed with the appellant. Section 35(5) and (6) of the Employment Act states- *'An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.(6)This section shall not apply where an employee is a member of—(a)a registered pension or provident fund scheme under the Retirement Benefits Act;(b)a gratuity or service pay scheme established under a collective agreement;(c)any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and(d)the National Social Security Fund.'* The Respondent relied on his NSSF statement . I find he was on NSSF thus not entitled to service pay and thus the award was in error. The same is set aside.

39. One month's salary in lieu of notice- -Kshs. 154,512/= -The notice was due under section 35 of the Employment Act for lack of procedural fairness and is upheld.

40. Overtime and leave claims -the grounds of appeal were- 'The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to overtime for the period 2003-2007 and ignoring the statutory limitation of time with respect to continuing injuries. The Honourable Magistrate erred in law and in fact by finding that the respondent was entitled to unpaid leave for the period 2003-2007 and ignoring the statutory limitation of time with respect to continuing injuries.'

41. The appellant submitted on overtime and leave that, -the Trial Court erred in law and in fact by awarding the Respondent overtime pay for the period April, 2003 - August, 2007. It was the Appellant's evidence before the Trial Court and as adduced by RW1 to the effect that the Respondent was NOT an employee of the Appellant during the period in question. The Respondent adduced as his evidence (page 11 of the record) an Appointment Letter dated 15t August, 2007 which evidence was uncontroverted. The award therefore for the disputed period 2003 - 2007 was unmerited as no evidence was tendered by the Respondent that he was in the Appellant's employ since 2003. In any event, the Respondent led evidence that the injury complained of being non-payment of overtime ceased since at least 2007. Pursuant to Section 90 of the controlling legislation, he should have filed his unpaid leave claim no later than August, 2008 - 12 months after cessation of the injuries complained of. That it is trite law that a claim for "overtime pay" is in the nature of a continuing injury and thus must be instituted within twelve (12) months next after the cessation thereof. The Respondent averred in his statement of claim (page 5 of the record) that he was owed unpaid overtime between April, 2003 and August, 2007 and in the amount of KSh. 247,728/=. The implication is that since at least August, 2007 the Respondent had no further claim for leave pay. The Appellant places reliance on the holding of the Court of Appeal in the Rift Valley Railways case, supra in which the Honourable Judges of the Appeal held that, "there are no exceptions to the 3-year limitation period save for cases of continuing injury or damage where action or proceedings must be brought within 12 months after the cessation thereof." That parties are bound by their pleadings and the Respondent averred that the injury of "unpaid leave" ceased on or about August, 2007 as per his statement of claim (page 5 para 8 of the record). It only follows then , that a claim for

unpaid leave by law, could not be brought any later than August, 2008 - 12 months after the cessation of the continuing injury.

42. The respondent submitted that there was no proof of leave for the period of 2003-2007 having been granted and that overtime was due as he pleaded he worked for 3 hours between 2003 and 2007.

43. The Court has a duty to evaluate evidence before the trial court(See *Selle* above). The employment letter was dated 1st August 2007. (page 11 of ROA.) The NSSF statement indicated the employment started in September 2007. Both documents were produced by the claimant (now respondent) before the trial court as evidence of employment. The employer stated the respondent was employed in 2007. He who alleges proves. The respondent produced before the court evidence of having proceeded in leave prior to termination. There was no evidence of prior employment by the appellant placed before the court to support the claims for leave and overtime prior to the employment letter. The trial court did not state the basis of the 2 awards. The claims further expired 1 year after cessation of injury, thus sometimes in 2008. Section 89 of the Employment Act states- *‘Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.’*The court for the foregoing reasons and for lack of proof of the claims and on basis of expiry of 12 months post 2006, I set aside the awards for overtime and leave in lieu.

Conclusion

44. The appeal is allowed with respect to awards for leave, overtime, and service/gratuity which are all set aside. The Judgment and Decree of the Hon. B. Ojoo (CM) delivered on 7th November 2024 in Mavoko MCELRC No. 10 of 2020 is set aside and substituted as follows-

Judgment is entered for the claimant against the respondent as follows-

- i. Unpaid salary (June 2019 to 21.8.2019) --Kshs. 154,512/=
- ii. Unfair termination- 12 month's salary (12x 55,032/=)-
- ii. One month's salary in lieu of notice- -Kshs. 154,512/=
- iii. Certificate of service
- iv. costs of the suit.

45. The appellant was partially successful in the appeal and is awarded ½ costs in the appeal.

46. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF MAY, 2026.

Jemimah Keli,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Owino

Respondent – Mutavi