



REPUBLIC OF KENYA



**Ongayo v Everflora Limited (Employment and Labour Relations Appeal
068 of 2023) [2025] KEELRC 242 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 068 OF 2023**

**JW KELI, J
JANUARY 31, 2025**

BETWEEN

ISAIAH NYANGARESI ONGAYO APPELLANT

AND

EVERFLORA LIMITED RESPONDENT

JUDGMENT

1. The Appellant being dissatisfied with the entire Judgment and Decree delivered on 26th April 2023 by Hon. O. Wanyaga (SRM) in Thika MCERLC No. E012 OF 2022 filed memorandum of appeal dated 9th may 2023 and received in court on the 17th may 2023 and a record of appeal received in court on the 31st May 2023 seeking for the appeal to be allowed , the decision of the Hon. Magistrate to be set aside /overturned /reversed and for the following reliefs:-
 1. The Honourable Court decision of dismissing the entire claim was erroneous and unjust and was arrived at without proper assessment, scrutiny and analysis of the entire evidence tendered by the Appellant.
 2. The Honourable Court finds that the Respondent failed to follow proper procedures while terminating the Appellant.
 3. The Honourable Court awards the Appellant Kshs. 8,772.70/=, his unpaid salary for the month of November 2021.
 4. The Honourable Court awards the Appellant Kshs.12,522.70/=being one month pay in lieu of notice.
 5. The Honourable Court awards the Appellant Kshs.199,817.20/= being accumulated salary underpayments as at the time of termination of employment.



6. The Honourable Court awards the Appellant Kshs.150,272.00/= being compensation equivalent to 12 months' salary for wrongful dismissal.
7. The Honourable Court awards the Appellant Kshs.800/= being his unremitted NSSF deductions for the months of June 2019 and January 2020.
8. The Honourable Court awards the Appellant Kshs. 37,568.10/=being compensation for unpaid amount for leave not granted.
9. The Honourable Court awards the Appellant Kshs.2,550/=being compensation for unpaid amount for leave travelling allowance.
10. The Honourable Court awards the Appellant Kshs. 130,236.08/=being compensation for unpaid overtime worked.
11. The Honourable Court awards the Appellant Kshs. 49,683.20/= being compensation for unpaid public holidays worked.
12. The Honourable Court awards the Appellant Kshs. 191,635.20/=being compensation for unpaid rest days worked.
13. The Honourable Court awards the Appellant a Certificate of service.
14. The Honourable Court awards the Appellant interest on the total.
15. The Honourable Court awards the Appellant costs in the Lower Court and costs of this Appeal to be borne by the Respondent.

Grounds of the appeal.

2. The learned Magistrate erred in law by failing to consider section 74 of the *Employment Act* on the responsibility of the Employer to provide Employment records.
3. The learned Magistrate erred both in law and in fact by placing on the Appellant the burden of production of evidence to show that his services were terminated.
4. The learned Magistrate erred both in law and in fact in holding that the Appellant failed to report to work after the doctor deemed him fit for resumption of duty albeit on light duties.
5. The learned Magistrate erred both in law and in fact by requiring the Appellant to produce as evidence, a letter indicating that he asked to be allocated light duties without success.
6. The learned Magistrate erred both in law and in fact in reaching the conclusion that the Appellant was paid for the 138 days he was on sick off, without reference to any payslips, while the Appellant was actually claiming his unpaid salary of Kshs. 8,772.70/= for the month of November 2021 from the Respondent.
7. The learned Magistrate erred both in law and in fact by failing to critically analyse all the documents filed in court thus arriving at a wrong conclusion. For example, the Respondents' Resumption of duty letter dated 21/4/2022 addressed to the Appellant. Listed as item 19 of the Respondent list of documents.
8. The learned Magistrate erred both in law and in fact in placing a higher burden of proof upon the Appellant as such reaching the conclusion that the Appellant had not proved his case on balance of probability.



9. The learned Magistrate erred both in law and in fact in failing to consider that the Respondent did not follow any termination procedures prior to issuing the Appellant with the letter dated 10/05/2022 requiring the Appellant to vacate the company premises.
10. The learned Magistrate erred in fact in failing to reach a conclusion that the Appellant was never summoned to any disciplinary hearing, he was never issued with any warning letters or subjected to any disciplinary hearing prior to being terminated.
11. The learned Magistrate erred in fact in failing to find that the Appellant was handed a show cause letter dated 30/11/2021, which never gave the Appellant sufficient time to respond to the claims of absenteeism. The Appellant was never subjected to any disciplinary procedures by the Respondent.
12. The learned Magistrate erred in fact by failing to appreciate the fact that the minutes of the hearing on 18/11/2021, being item 17 of the Respondent list of documents never discussed termination of the Claimant.
13. The learned Magistrate erred in law and fact by failing to appreciate the concept of Constructive termination. The Learned Magistrate failed to consider the fact that the Appellant was never paid any salary from the Month of November 2021 up until 10th May 2022, when he was handed a letter to vacate the company house. The Respondents' failure to pay the Appellant's salary and failure to allocate light duties to the Appellant led to termination as opposed to Constructive termination.
14. The learned Magistrate erred in law and fact by failing to appreciate the fact that the Appellant instituted a suit in court on 24/3/2022 against the Respondent having failed to receive his salary from the month of November 2021 through March 2022 or assigned any work by the Respondent.
15. The learned Magistrate erred in law and fact by failing to place a burden upon the Respondent to prove desertion of duty by the Appellant who actually stayed within the Respondent staff houses.
16. The learned Magistrate erred both in law and fact by failing to arrive to a conclusion that the Appellant's consolidated monthly salary of Kshs. 7,500/= was below the stipulated statutory minimum salary of Kshs.12,522.70/= exclusive of housing as per [*Legal Notice 1 of 2018*](#).
17. The learned Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Kshs. 199,817.20/= ostensibly on account of underpayments, the Appellant having worked for the Respondent for 4 years and 3months.
18. The learned Magistrate erred both in law and fact by failing to make a gratuitous award in favour of the Appellant for the sum of Kshs. 150,272.00/= ostensibly on account of compensation equivalent to 12 months' salary for unfair and /or wrongful dismissal or unlawful termination.
19. The learned Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Kshs. 12,522.70/= ostensibly on account of one month pay in lieu of Notice for unfair and/or wrongful dismissal or unlawful termination.
20. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 800/= on account of unremitted NSSF deduction despite the Appellant NSSF statement showing the same was never remitted for the month of June 2019 and January 2020.
21. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 37,568.10/= on account of leave pay for the last 3years worked and Kshs. 2,550/=on account of leave travelling allowance by the Appellant which the Appellant was in Law entitled.



22. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 130,236.08/= on account of overtime hours worked despite the fact that the same was never compensated as reflected in the Appellant payslip.
23. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 49,683.20/= on account of unpaid public holidays worked despite the overwhelming evidence adduced by the appellant.
24. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 191,635.20/=on account of unpaid rest days worked despite the overwhelming evidence adduced by the appellant.
25. The learned Magistrate erred both in law and fact by dismissing the Appellant's claim with half of costs without properly addressing the evidence produced before court.
26. The learned Magistrate erred both in law and fact in failing to award a Certificate of Service which the Appellant was in Law entitled.
27. The learned Magistrate erred in law in failing to appreciate the evidence adduced and tendered in Court.
28. The learned Magistrate misdirected herself in analysis, evaluation, interpretation and assessment of the entire evidence tendered by the Appellant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.
29. The learned Magistrate erred in law by failing to appreciate the principal of constructive termination and basing her decision on extraneous factors.
30. The entire decision is contrary to law and a misapprehension of the law.

Background to the appeal

31. The appellant was the claimant before the subordinate court and had filed a memorandum of claim dated 7th April 2022 alleging to have been employed by the Respondent and on 1st December 2021 orally dismissed from employment without payment of November salary. He sought compensation for wrongful dismissal and special damages with respect to underpayments, unpaid salary for November 2021, notice pay for 1 month, unremitted NSSF deductions, untaken leave for 3 years, leave travelling allowance, overtime, unpaid travelling allowance, overtime, unpaid public holidays, rest days, interest, certificate of service and costs.(pages 8-27 of RoA was the claimant's case).
32. The respondent entered appearance through the law firm of J.N Mbuthia & Co. Advocates and filed response to the claim. The respondent opposed the claim and stated the claimant was never dismissed from employment as alleged. The respondent filed witness statement and documents in support of response. (pages 28-59 of RoA was the response and bundle of documents)
33. The appellant's case(claimant) was heard by the trial court on the 1st March 2023 where he testified on oath, produced documents under the list dated 7th April 2022 (C-exh 1-3), and was cross-examined by counsel for the respondent. The Respondent's case was heard on the same date when it called Bernice Nkatha Matiri as its witness of fact who adopted her statement dated 22nd August 0222 and produced documents under its list of documents dated 23rd August 2022 (R-exh 1-22)(Trial Proceedings at pages 95-100 of RoA).



34. The Trial court, Hon O. Wanyaga, SRM, delivered judgment on the 26th April 2023 dismissing the suit with half costs to the respondent.

DETERMINATION

35. The appeal was canvassed by way of written submissions. Both parties complied.
36. The Court was sitting on the first appeal. The duty of the court sitting as the first appellate court is as stated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) thus, ‘ This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze 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. ‘

Issues for determination

37. The appellant identified the following as the issues for determination in the appeal:-
- i. When was the Appellant terminated?
 - ii. Was the Appellant unlawfully and unfairly terminated?
 - iii. Whether the Appellant is entitled to prayers sought?
 - iv. Whether the Appellant is entitled to costs of the Claim and interest from the date of filing the Claim?
38. The Respondent addressed the merit of the appeal in general.
39. The court having read the case found the issues identified by the appellant were relevant and adopted the same for determination.

When was the Appellant terminated form employment?

Appellant’s submissions

40. It was the Appellant’s testimony that he was sacked due to the injuries sustained at work. He further testified that after getting healed he went back and was never given work. (Reference on record of Appeal, typed proceedings, at page 96, lines number 4 – 6). On 30th November 2021, the Appellant requested for more days to enable him recuperate.
41. That it was the Respondent witness testimony that the Appellant was granted unpaid leave that ran from 1st December 2021 to 30th December 2021. It was Respondent’s witness testimony that the Appellant never deserted duty in December 2021 as he was on unpaid leave. (Reference on record of Appeal, typed proceedings, at page 98, lines number 6 – 11.) The Respondent filled a copy of the master roll for the month of December 2021, which document actually confirms the fact that the Appellant had been granted one month unpaid leave. (Reference on record of Appeal, muster roll, at page 52).
42. That on the 10th March 2022, the Appellant served the Respondent with a demand letter. The letter was served after the Respondent had failed to allocate work or pay any salary to the Appellant. In mid-April 2022, the Respondent’s witness confirmed that the company was served with Court summons and pleadings. (Reference on record of Appeal, typed proceedings, at page 98, lines number 13 – 14.) On 21st April 2022, upon the Respondent being served with the court documents he decided to



issue the Appellant with a letter requiring him to immediately resume duty. The Appellant had never been issued with any letter to resume duty as from the month of January to March of the year 2022. (Reference on record of Appeal, resumption of duty letter dated 21st April 2022, at page 56).

43. That in the year 2022, the Appellant was never subjected to any medical checkups nor had doctor appointments. The parties were having a disagreement on the amount of money the Appellant was supposed to be compensated for the injury that he had sustained while at work. The Respondent was never willing to pay any compensation. The Respondent ended up paying the money after the intervention of the labour office. (Reference on record of Appeal, typed proceedings, at page 96, lines number 9).
44. That the Appellant was never paid part of his salary for the month of November 2021. He was also never paid any salary from the month of December 2021 up to the month of May of the year 2022. In the month of May of the year 2022, the Appellant was evicted from the company house. The Respondent never produced any payment records before court to dispute this fact. That the Respondent witness confirmed that they were the custodian of employment records of its employee. (Reference on record of Appeal, typed proceedings, at page 98, lines number 5-6). The sick off form presented by the Respondent relate to the various days that the Appellant was granted off days in the year 2021. The Appellant was never granted any 138 sick off days as being alleged by the Respondent. An analysis of the sick off forms show that:-
 - i. Sick off form that is not dated but shows with effect from 23rd August 2021, granted the Appellant a one day off. Reference on record of Appeal, sick off form, at page 41.
 - ii. Sick off form dated 27th August 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 42.
 - iii. Sick off form that is not dated but shows with effect from 30th August 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 43.
 - iv. Sick off form that is not dated but shows with effect from 3 rd September 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 44.
 - v. Sick off form that is not dated but shows with effect from 6 th September 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 45.
 - vi. Sick off form that is not dated but shows with effect from 10th September 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 46.
 - vii. Sick off form dated 17th September 2021, granted the Appellant a three day off. Reference on record of Appeal, sick off form, at page 47.
45. The appellant submitted that a sick off form is issued to an employee at work to allow an employee to attend to medical. The records adduced by the Respondent do not support the Respondents averments that the Appellant was granted 138 sick off days. A tabulation of the sick off days is far away from 138 sick off days. It is also worth noting that some of the sick off forms do not indicate the date when the form was issued. The sick off forms have also not been attested by any medical superintendent.
46. The appellant contended that the Respondent never produced any sick-off form that relates to the year 2022. The Respondent also never produced any patient referral/ consultation form that relates to the year 2022. The Respondent never produced any muster roll that relates to the year 2022. The patient referral/consultation form relates to the month of September of the year 2021. Reference on record of Appeal, patient referral/consultation form, at page 48 of Record of Appeal (RoA). The Respondent's conduct of failing to pay the Appellant any salary or allocate him light work by inference resulted to



the termination of the employment relationship. The Respondent tried to regularize his unlawful acts after being sued and served with court pleadings.

The Response submissions

47. The respondent submitted that from the evidence of both sides before the trial court it turned out the appellant deserted work and opened a barber shop in the neighborhood while staying in the respondent's house. That he failed to work even after the doctor certified him for light duties. The appellant was given a return to work formula which he failed to follow up. That the appellant had no proof of service of a demand letter. He had no proof he served the documents immediately after filing the case on the 21st of April 2022. The memorandum of claim is stamped as received by court on 24th March 2024 yet it is dated 7th April 2022. That the issue of conflicting dates confirms an attempt to defeat the allegation by employer on return to work procedures vide letter dated 21st April 2022.

Decision.

48. The trial court held that the claimant had not presented any evidence that his services were terminated nor even a letter requesting to be allocated lighter duties. That there was evidence that the respondent took care of his medical services. That after the appellant was certified fit to resume work, a meeting was held whereby the workers representative was present and despite agreement for the appellant to resume duty on 19th November 2021, the appellant sought for unpaid leave which was granted. After the unpaid leave the appellant did not resume duty. A letter was issued by the employer on 10th May 2022 to the appellant to vacate the allocates house. The trial court found it unbelievable that the respondent would have the appellant in their house if they had terminated his employment. The trial court held the position of the respondent more believable.
49. The court having considered the decision of the trial court, the appellant's submissions and those of the respondent held that the burden was on the Appellant to prove he had been terminated from employment. In the statement of claim, it was stated the appellant was verbally dismissed on the 1st of December 2021. The witness statement did not state how his employment ended.
50. During cross-examination, the Appellant denied having attended the meeting of 18th November 2021 leading to the minutes produced as R-exh 18 (paged 53-54 of the RoA). The court noted that the Appellant was listed as present and signed the minutes, there was also a workers' representative present. In the minutes it was recorded that the appellant had accepted to resume duty on 19th November 2021 as recommended by the doctor. The minutes were served on time but there was no rebuttal evidence on the signature. The Appellant could have called the workers' representative as his witness if he disputed the minutes. A show cause letter was issued dated 30th November which the employee received and he wrote stating he had no sick off from the doctor and asked for unpaid leave (Page 55 of the RoA). The court noted during the hearing the Appellant did not deny the content of the show cause letter.
51. The court held that on a balance of probabilities the employment of the Appellant was not terminated by the time of filing the suit dated 7th April 2022 as the Appellant admitted he got notice dated 10th May 2022 to vacate the employer's house. Just like the trial court this court finds it unbelievable that the respondent would have allowed the appellant to continue staying in its house if it had terminated the services on the 1st December 2021 as alleged. The court upheld the finding of the trial court that the employment of the Appellant was not terminated as at the time he filed the suit in court.



Was the Appellant unlawfully and unfairly terminated?

Appellant submissions

52. The appellant submitted that on the 21st April 2022, he was requested to return to work. The Respondent's witness testified that the Appellant was supposed to be back to work as at 31st December 2021 but he didn't. The Appellant was requested to return to duty on 21st April 2022. The Respondent only made an effort to recall the Appellant back to work in the month of April of the year 2022 after filing of the suit. (Reference on record of Appeal, typed proceedings, at page 98, lines number 14-17.) The Appellant was never issued with any termination letter. The Respondent had not produced any minutes of a meeting that discussed the termination of the Appellant. On 10th May 2022, the Appellant was instructed through a letter to vacate the company house. The Respondent has not filed any attendance master rolls to support any allegation of desertion of duty by the Appellant.) Reference on record of Appeal, letter dated 10th May 2022, at page 50). The Appellant was never issued with any summons to any disciplinary, never given a hearing or offered an appeal procedure against any decisions of the disciplinary hearing. The Respondent failed to follow the rules of natural justice prior to terminating the Appellant. Any claim of desertion of duty must be proved by the employer as it won't be enough to simply state that an employee deserted duty. The Appellant invited the Court to consider the case of *Evans Ochieng Oluoch-Vs-Njimia Pharmaceutical Limited* [2016] eKLR, where the court held as follows;- "The Claimant states that he was verbally terminated on the 17th December 2010 after making a request to go on leave. The Respondent on the other hand states that the Claimant deserted duty after being summoned to a meeting to discuss under performance of his duties. Desertion amounts to gross misconduct, it must be proved. it is not enough for an employer to simply state that an employee has deserted duty. The Respondent is supposed to show some efforts were made towards getting in touch with the Appellant when any allegation of desertion of duty is raised." The appellant invited the court to consider the said authority where court continued to state;- "According to this letter, some effort was made to reach the Claimant. However, the Claimants manager who is said to have made these efforts was not called as a witness and the court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserted employee. At the very least, the employer must issue reasonable notice to the employee that the termination of employment is being considered."
53. Relying on the foregoing authority the appellant submitted that the Respondent never produced any attendance records or communication to prove his allegation of desertion of duty. The Respondent never showed any effort made towards reaching the Appellant the moment he failed to report to duty. That the Honourable Court misdirected itself by reaching a conclusion without any records showing that the Appellant deserted duty. The Respondent never filled any attendance records for the year 2022 to support the allegations of desertion of duty. The Respondent never presented any letter received by the labour office reporting desertion of duty. The lower Court imported evidence which was never adduced by the Respondent.
54. The appellant submitted that he was unlawfully and unfairly dismissed. He relied on the provisions of Section 47(5) of the *Employment Act* to wit:- "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." Section 43 of the *Employment Act* provides for Proof of reason for termination. It states; 43(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. Section 45 of the *Employment Act* discusses Unfair termination as follows: —”

- (1) No employer shall terminate the employment of an employee unfairly.
- (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 termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirement of the employer, and
 - (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any previous warning letters issued to the employee.”

55. The appellant to buttress his submissions further relied on the case of James Ondima Kabesa -vs- Trojan International Limited [2017] eKLR where Onyango J. observed as follows; “In considering if termination is fair, the Court must consider two limbs; whether fair procedure as provided in section 41 of the *Employment Act* was complied with; and, if there was valid reason for termination as provided under section 43. Section 45 provides that if either of the two was not complied with then the termination is unfair.” Further in the case of Naima Khamis -vs- Oxford University Press (E.A)Ltd [2017] eKLR the Court stated; “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43 (1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination should be done according to a fair



procedure. From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employers fail to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required. ‘

56. The Appellant submitted that the learned Magistrate failed to address himself on termination procedures. The Burden of giving reasons for termination and proving fair termination is upon the Respondent. The Respondent has failed to file sufficient documents to support their allegations against the Appellant.

Response

57. The respondent did not state anything outside the submissions under this on termination.

Decision

58. The court having upheld the trial court’s finding that the employment of the Appellant was not terminated then finds the issue of whether or not the termination was unlawful is moot.

Whether the Appellant is entitled to prayers sought?

59. The trial court appears not to have addressed other reliefs sought on the employment.

Unpaid salary

60. The appellant claimed he was underpaid during his employment. The respondent relied on the Agricultural And Wages Order of 2022 to state that it paid the appellant over the statutory minimum.

Appellant’ submissions

61. The Appellant’s case was that he was dismissed without any commitment on payment of his unpaid salary, other employment benefits nor work injury benefit. That he was never paid part of his salary for the month of November 2021 and never received any salary payments from the month of December 2021 through May 2022. The Appellant submitted that the Respondent was economical on payment records and never produced any pay slips or salary payment forms at trial. (Reference on record of Appeal, judgment, at page 86, lines number 6-8). The treatment expense analysis shows that on 1st April 2022, the Appellant’s salary for 5 months at Kshs. 7,500/= per month totalled to Kshs. 36,021/=. The amount is erroneous as it should have been Kshs. 37,500/=. The Appellant was also entitled to a disability assessment allowance of Kshs. 1,000/=. The Appellant was never paid the calculated 5 months’ salary or any disability allowance. That the Respondent seemed to imply that the Appellant’s salary was used towards payment of medical expenses. (Reference on record of Appeal, Respondents document, Isaya Nyangaresi treatment expenses, at page 51). The lower Court never addressed the question of unpaid salary. The Appellant confirmed that the Respondent compensated him for the work injury sustained as per the labour office directions. The Appellant was never paid his salary arrears.

Response.

62. The respondent submits that the claim for unpaid salary for November 2021 was not proved.



Decision

63. The claim was that the appellant was not paid part of his salary in November 2021. In response witness statement, it was stated that the salary for November 2021 was paid less 6 days deducted for absence from work(at page 33 of the RoA). There was no reply to the response. The court held that the claim for unpaid salary for November was not proved. The court discarded the submissions on unpaid salary for other months as it was outside the appellant's pleadings.

Claim for One month pay in lieu of Notice Kshs. 12,522.70/=

64. The Appellant's case was that after getting healed he went back and was never given work. It was the Appellant's case that he was never issued with any notice. He was informed by the Respondent that his services were no longer required and should vacate the company house. (Reference on record of Appeal, Judgment, at page 85 lines number 26 and page 86, lines number 1 – 3). That the trial court failed to look into the procedures followed by the Respondent before terminating the Appellant. The Respondent was served with court papers in April 2022 while they requested the plaintiff to return to duty on 21st April 2022. The action taken by the Respondent was after they had been served with court documents. The Appellant was never issued with any termination notice. They submitted that the Appellant never wilfully stopped reporting to work.
65. The buttress the appeal for one-month salary in lieu of notice, the appellant relied on the provisions of the *Employment Act* under section 35 (1) (c) to wit:- '(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall ,if made to be performed in Kenya, be deemed to be- (c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.'
66. On the notice pay in lieu, the court having held that as at time of filing suit alleging termination the employment had not been terminated, the issue of notice pay cannot apply. The appeal is disallowed.

Claim for Underpayments -Kshs. 199,816.20/=

67. The Appellant submitted he was employed as a general labourer. He was paid a monthly salary of Kshs. 6,740/= from the December 2018 through December 2020. In January of the year 2021, the Appellant salary was increased to Kshs. 7,500/= until when he was terminated. He was issued with a pay slip. (Reference on record of Appeal, copies of pay slips, at page 21-22). The Appellant's salary was below the basic minimum monthly wages of Kshs. 12,522.70/= (exclusive of housing allowance) provided for under the Regulation of Wages (General) (Amendment) Order, 2018. This minimum wage is applicable to workers in all former municipalities and town councils of Mavoko, Ruiru and limuru. The Respondent is located within Thika as such falls under this bracket. The Respondent's witness testified that she had not filed documents to show that the company is involved in agricultural business. It was upon the Respondent to adduce registration documents to confirm that the company is registered to operate in the agricultural sector.) Reference on record of Appeal, typed proceedings, at page 98, lines number 12-13.) That the Appellant is entitled to be paid the difference between the minimum statutory salary provision and the actual salary paid. The trial court never addressed itself on the issue of underpayment by failing to appreciate the regulation of wages (Genera)(Amendment) order, 2018. The limitation of time Act allows for payment of Claims below 3 years. That where there is direct legal provision; the law of estoppel is not applicable to stop awarding the Claimant his underpaid salaries. The appellant sought to be paid as per the claim.



Decision on Claim for Underpayments

68. The trial court did not address the issue. The parties relied on different legal framework. The Appellant on the regulation of wages (General)(Amendment) order, 2018 and the respondent on the Regulations of wages (agricultural industry) amendment 2022.
69. The respondent in response stated that it was within the agricultural sector with own wage regime regulated by the minister from time to time. It was not in dispute that appellant had been injured while at work. The respondent stated he was injured in a greenhouse. In evidence in chief the appellant told the court he fell from top of a green house. The court finds it was undisputed the responded was within the agricultural industry whose minimum wages is under Wages (Agricultural Indutrsy) Amendment issued by the concerned minister from time to time.
70. The court having held that it was undisputed (for lack of reply to response),the applicable wages order was the agricultural industry as pleaded and there being no rebuttal by way of reply then the claim for underpayment fails as the Respondent salary Kshs. 7500 and he was housed by the respondent. The 2022 Wages (agricultural industry) Order provided for unskilled employee salary at Kshs. 7544.65 hence negligible difference with salary paid to the appellant of Kshs 7500 with housing. The court disallows the prayer.
71. On the claim for untaken leave – the evidence before the court was that the appellant applied for unpaid leave. He proceeded on the leave and failed to resume duty, the claim for leave fails.

Claim for Overtime, unpaid public holidays and rest days

72. Whereas the prayers were sought in the claim, they were not in witness statement of the appellant. The prayers were not in the evidence in chief being the witness statement adopted by the claimant at trial. The claims were not proved.

Conclusion

73. In the upshot the appeal is held to be without merit and fails save for the certificate of service which ought to issue unconditionally under Section 51 of the Employment Act. To temper mercy with justice the court makes no order as to costs in the appeal.
74. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF JANUARY , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant - absent

1st & 2nd Respondents: Wangui Wangai

