



**Lupat Cleaning Services Limited v Cheserem (Employment and Labour Relations Appeal E249 of 2023) [2025] KEELRC 646 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 646 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E249 OF 2023**

**JW KELI, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**LUPAT CLEANING SERVICES LIMITED ..... APPELLANT**

**AND**

**EUNICE CHESEREM ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, dissatisfied with the Judgment and Orders of the Honourable Paul K. Rotich(SPM) delivered at Nairobi on the 1<sup>st</sup> November 2023 in Nairobi CMEL No. E657 of 2020 between the parties filed a Memorandum of Appeal dated 30<sup>th</sup> November 2023, seeking the following orders:-
  - a. That this appeal be allowed with costs to the Appellant.
  - b. That the judgement in Milimani Commercial Chief Magistrates Court MCELRC No. E657 of 2020 delivered on 1<sup>st</sup> November, 2023 be set aside and/or vacated forthwith and the same be substituted with an order of this Honorable Court dismissing the Respondent's Claim with costs.
  - c. That such other and/or further orders be granted on this Honorable Court may deem fit and just to grant.

**Grounds of the appeal**

2. The Learned Magistrate erred both in law and fact when they made a finding that the Claimant was entitled to the prayers sought in the Claim.
3. The Learned Magistrate erred in law and fact in failing to appreciate the principle of freedom of contract between the parties which terms of the employment contract between the Appellant and the



- Respondent was executed with the knowledge of both parties prior to the respondent commencing his employment with the respondent.
4. The Learned Magistrate erred in law and in fact in failing to properly evaluate the evidence on record tendered by the Appellant and /or failing to properly and exhaustively evaluate the said evidence and therefore arriving at a wrong conclusion.
  5. The Learned Magistrate erred in law and in fact by failing to exercise discretion of the Court to exercise justice by failing to take into consideration the fact that the Claimant's indicated date of termination of 27th September, 2019 at the County Labour Office contradicted with the oral and documentary evidence provided in Court and making a consequent erroneous award of unlawful termination.
  6. The Learned Magistrate erred in law and fact in making a finding that the Respondent was underpaid and making a consequent erroneous award of Kshs. 282,532.90 as the cumulative under paid dues.
  7. The Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 63,031.50 being payment in lieu of leave days not taken summing up 105 days for a period of 5 years which was included in the decretal sum.
  8. The Learned Magistrate erred both in law and fact in that it failed to consider at all and/or adequately the Appellants evidence and as a result of which it arrived at a wrong decision.
  9. The Learned Magistrate erred in law and fact in failing to take into account the Appellant's evidence that the Respondent had absconded duty thereby arriving at an erroneous decision that the Respondent had been unlawfully terminated.
  10. The Learned Magistrate demonstrated in his judgement outright bias against the Appellant by making a finding that the Appellant was liable for wrongfully and unfairly terminating the Respondent's employment.
  11. The Learned Magistrate misdirected himself and fell into error by ignoring the fact that the Respondent did not produce any evidence to prove that she was unfairly terminated from her employment.
  12. The Learned Magistrate erred both in law and fact and this fell into error by failing to consider the terms and conditions of the employment contract and the fact that the Claimant was in breach of the said terms.
  13. The Learned Magistrate misdirected himself in law and in fact in failing to note that the Respondent failed to prove unlawful termination of employment pleaded in the claim.
  14. The Learned Magistrate erred and misdirected himself in law and in fact in finding the appellant liable for unfair and unlawful termination of employment taking into account the totality of evidence both oral and documentary before him.
  15. The Learned Magistrate erred in law and fact by failing in, appreciating and considering the Appellant's submissions which were duly filed only to the prejudice and detriment of the Appellant.
  16. The Learned Magistrate erred in law and fact in arriving at conclusions and inference which are not supported by evidence and /or based on any documentation.
  17. Other grounds and reasons to be adduced at the hearing hereof.



## Background To The Appeal

18. The Claimant/Appellant filed claim against the Respondent vide a memorandum of claim dated 11<sup>th</sup> August, 2020 seeking the following orders: -
  - a. A declaration that the Respondent's act of terminating the Claimant's employment was unprocedural and amounted to unfair termination
  - b. The Claimant be paid her terminal benefits as set out in paragraph 4 hereinabove totalling to Kshs. 573,543.20/=
  - c. Costs of the suit
  - d. Interest on (b) and (c) above at Court rates
  - e. Certificate of Service
  - f. Such further or other relief as this Honourable Court may deem fit.
19. The Claimant filed his verifying affidavit, his Witness statement, and a list of documents all of even date together with the bundle of documents (see pages 8-22 of ROA).
20. The claim was opposed by the Respondent who entered appearance and filed a Statement of Response to Memorandum of Claim dated 15<sup>th</sup> October, 2020 (pages 24-25 of ROA), Respondent's list of witnesses, Respondent's Witness statement of Lucy Mutie dated 5<sup>th</sup> February, 2021 and Respondent's list and bundle of documents dated 8<sup>th</sup> February, 2021(Pages 26-31of ROA ).
21. The claimant's case was heard on the 12<sup>th</sup> June, 2023 where the claimant testified in the case, produced her documents, and was cross-examined by counsel for the Respondent Mr. Muchucho (pages 60-62 of ROA).
22. The Respondent's case was heard on 10<sup>th</sup> July, 2023 where RW1 Ms. Lucy Mutie testified on behalf of the Respondent. She relied on her filed witness statement. She was cross-examined by counsel for the claimant Mr. Mokaya (pages 63-64of ROA)
23. The parties took directions on filing of written submissions after the hearing. The parties complied.
24. The Trial Magistrate Court delivered its Judgment on the 31<sup>st</sup> October, 2023 awarding the claimant a total sum of Kshs. 573,543.20/= together with cost of suit and interest. (judgment at pages 66-74 of ROA).

## Determination

25. The appeal was canvassed by way of written submissions. Both parties complied.
26. 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."



27. The Court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation 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.

### **Issues for determination**

28. The Appellant submitted the following issues for determination: -

- a. Whether the trial Court erred in finding that the Respondent was unfairly terminated; and
- b. Whether the trial Court erred in awarding the Respondent the reliefs sought.

29. The Respondent submitted the following issues for determination:

- a. Whether the termination was unfair and unlawful.
- b. Whether the Respondent was terminated on 27<sup>th</sup> September 2019.
- c. Whether the Respondent withdrew cash at an ATM on 23<sup>rd</sup> September in Mbale town.
- d. Whether the deceased was mother or father to the Respondent.
- e. Whether the Respondent absconded duty.

30. The Court having perused the appeal and written submissions of the parties was of considered opinion the issues placed by the parties before it for determination in appeal were as follows: -

- 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 reliefs awarded.

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

Appellant’s submissions

31. The Appellant submits that the Learned Magistrate made findings that were not based on facts or evidence, to the effect that the Respondent herein was not unfairly terminated but rather absconded from her duties. The unlawful termination award by the trial Court is erroneous, for the Respondent failed to provide evidence on where and how the termination took place. A quick examination at the claimant’s statement of claim reveals quite a number of discrepancies and inconsistencies in the claim. Particularly on the dates when she was allegedly terminated by the Appellant herein. The statement of claim indicates that she was terminated in October, 2019 (at page 5, line 2 of the Record of appeal ) while in her list of documents,( at page 17 of the record of appeal), it is indicated in the complaint to the labour office that her employment was allegedly terminated on 27th September, 2019. The Learned magistrate failed to consider the above in his judgement and found that indeed the Respondent was unlawfully terminated even though it was a glaring issue that ultimately demonstrates the untruthfulness of the Respondent herein. The Learned Magistrate failed to take into consideration the fact that there was no termination letter that was present in the Court record, which indicates the alleged date of 27th September, 2019, when the Respondent claims to have been terminated.

32. Section 47 (5) of the *Employment Act* clearly states that “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”. The Respondent failed to discharge



this burden. The Respondent's evidence at the County Labour Office on the date of the alleged termination contradicted oral and documentary evidence submitted in Court.

33. That the Respondent and the Appellant had freely and willingly entered into a contract of employment with the Respondent in the year 2017, which is contract is contained in the record of appeal at page 28-29 which on the face of it does not, which the Court acknowledged, did not contain any unlawful and unfair clauses. The trial Court, however failed to take into consideration that the Respondent's previous relationship with the appellant was not of permanent employment but she was a casual worker until she was employed in the year 2017. The appellant relied on the decision in the case of Kenya Broadcasting Corporation v Geoffrey Wakio where the Court stated "This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical." That as regards the award of 12 months' salary compensation for unfair termination, it is evident from the record that the trial Court never gave any reason to justify the maximum award of 12 months' gross salary. The emerging jurisprudence is that the discretion to award compensatory damages must be judicially exercised by considering only the relevant factors. The Court failed to consider relevant factors, on its award and we call upon this Court to interfere with the award at the trial Court in this appeal. That the trial magistrate erred in law and in fact in failing to consider the Appellant's viva voce evidence that they received a summons from the Labour office on 24th October, 2014 with the Claimant claiming that she had been unfairly terminated from her employment on 27th September, 2019. The Court did not take into consideration the fact that the Appellant testified that they responded to the summons by the Labour office in which they stated orally in Court that the Respondent had taken her unpaid leave on 30th September, 2019 and was to get back on 16th October, 2019 but she did not report back to work and their efforts to try to reach out to the Respondent were all in vain. She absconded work and that they later learnt that she was working elsewhere. That that the Appellant did have documentary evidence in support of the fact that the Respondent absconded work, but the leave to file out of time was denied by the Court at page 62 of the record of appeal for the reason that the same lacked merit and would not be considered. However, had the same been considered, the Court would have reached an extremely different outcome altogether.
34. That the Respondent herein submitted further list of documents at page 20, exhibit 1, that she had informed the appellant that she had gone to her mother's funeral and even attached the burial permit. Which is why she requested for leave, however her oral evidence as indicated in the record of appeal states that she had gone for her father/ dad's funeral which in itself is contradictory evidence, that the Court should have considered in reaching its determination.
35. That the Learned magistrate erred in law and in fact in failing to consider the evidence on record that by the time the Respondent applied for leave in September, 2019, she had already used up all her leave days for that year and had applied for unpaid leave days which was to start on 30th September, 2019 and run up to 16th October, 2019, when she was to report back to work but she instead absconded. The Respondent testified that she was sacked by a person who did not have such authority from the appellant and that she made no attempts to reach out to the Appellant's Managing Director, when she came back on 16th October, 2019 and the same is documented at page 61, line 12-14 despite the fact that she alleges to have been unlawfully terminated, which would have followed with a termination letter if the same was true.
36. That the Learned magistrate in reaching his determination failed to take note of the Respondent's oral and documentary evidence that that in her bank statements provided in her list of documents, marked



- at EC1, at page 15 of the record of appeal. The Respondent made a withdrawal at the physical ATM machine in Mbale Town, on 23rd September 2019, a time when she claimed to be at work, clearly indicating insubordination on her part and that she had absconded work to run her private affairs at the expense of the Appellant when she was supposed to be at work.
37. That the Respondent indicated at the trial hearing that the account was privately owned therefore no one else expect herself had access to the account but could not explain how she had managed to withdraw money physically from a different town from where she was working while she was to be at work. She has failed to account for the days that she was to be at work from the 23rd September, 2019 to 27th September, 2019.
38. That it is not possible for the Respondent to claim unfair termination on 27th September, 2019, when she claims to have travelled to Vihiga on the same day without permission, and to have also asked for unpaid leave while she was in Vihiga, which she was duly granted, for the period between 30th September, 2019 and run up to 16th October, 2019 when she was to come back and she did not, and instead absconded work.
39. That the Learned magistrate erred in law and in fact by awarding a claim for unfair and unlawful termination without considering the proper evidence on record. The Appellant herein provided evidence demonstrating that the Respondent had absconded her duties. Absenteeism without just cause constitutes gross misconduct under Section 44(4)(a) of the *Employment Act*, 2007, even though despite the above, she was not terminated from her employment with the Appellant. The Learned Magistrate misdirected himself by finding the Appellant liable for unfair termination, despite clear evidence of the Respondent's abscondment and misconduct. The Respondent absconded from her duties and disregarded the notices issued by the Appellant, including the show cause letter and the invitation to the disciplinary hearing. Her conduct demonstrated a blatant disregard for her contractual obligations. That the decision by the trial Court was not backed by any substantial evidence produced in Court by the respondent and we place reliance on the case of Jasper Maluki Kitavi v Minister for Lands, Settlement & Physical Planning & another [2017] eKLR where the Court cited Kenya Ports Authority v Kushton (Kenya) Limited (2009) 2EA 212 in which the Court of Appeal held that:- "On first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence." The Court of Appeal in J.S.M V E.N.B (2015) eKLR held that: "We shall however bear in mind that this Court will not lightly differ with the trial Court on findings of fact because that Court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent in which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the Learned Judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions." Going by the evidence on record, it is clear that the trial Court failed to take into consideration that the trial case did not et the threshold required for unfair and unlawful termination and to this extent of an award for 12 months gross compensation is unjustified.
40. In Otieno v Penda Health Limited (Cause E424 of 2024), the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR was cited, where the Court made the following observation; "the ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee."



Guided by the foregoing, the Appellant's actions align with both the Court's decision and the provisions of the Employment Act. The Learned Magistrate however misdirected himself and awarded the Respondent, despite her gross misconduct and disregard for the disciplinary process. This decision is not only inconsistent with the principle of procedural fairness but also contrary to the equitable maxim that "he who comes to equity must come with clean hands."

41. The Learned Magistrate erred in failing to appreciate the binding nature of the employment contract executed between the parties, contrary to the principles enshrined under the Law of Contract Act and the Employment Act. Section 3(1) of the Law of Contract Act emphasizes that a legally executed contract is binding and enforceable as between the parties. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court of Appeal held: "A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved." The Respondent absconded from duty without justification, an act that was a material breach of the employment contract. The Appellant's actions were therefore justified by treating the Respondent's absence as a repudiation of the contract. Section 49 and 50 of the Employment Act empowers the Court to award salary in lieu of notice and compensation for unfair termination. Subsection (4) then sets out the factors to consider when exercising discretion to award relief to an unfairly dismissed employee. The trial Court however failed to demonstrate in its judgment the tenets used in its discretion to grant an award for unfair and unlawful termination. The failures in such essential bit of evidence points to only one irresistible conclusion that, the finding of the trial Court was erred.

### **Respondent's submissions**

The Respondent submitted as follows:-

42. On the evening of 27th September 2019 after work, the Respondent did not require any permission from the Appellant as the following day was not a working day for her. The Respondent travelled to her rural Home in Vihiga County. While in Kisumu that night, before reaching home, she received a call from her sister, who informed her of the passing of her mother. The Respondent called her Manager, Lawrence Kaduku on Saturday 28th September 2019 and informed him of her mother's demise. She requested for two weeks off that was to be setoff with her annual leave days. The Manager had no objection to the request but told the Respondent to inform her Supervisor, Onesmas Mudhini. The Supervisor did not object to her request. The two-week period started running from 30th September 2019 and ended 16th October 2019. When the Respondent reported to work on the 16th October 2019, she went straight to the office to seek for her September salary that had not been paid. The Manager Lawrence Kaduku informed her that her services were no longer required and there was no September salary for her. The Respondent was directed to leave the office immediately. The Appellant has not controverted the above facts. The Manager Lawrence Kaduku and the Supervisor Onesmas Mudhini could have easily testified to refute being contacted by the Respondent on the material day. In her testimony the Managing Director Lucy Mutie did not deny that the Respondent called the office, she was only interested in the absconding story.
43. The Respondents employment was verbal as her termination and she never absconded duty. The alleged contract filed by the Appellant is dubious as the Respondent never appended her signature on any contract. From the face of the contract it indicates that it is a Permanent Employment Contract. The Agreement is made on 21st of August Two Thousand and Eighteen that was changed to Two Thousand and Thirteen and later to Two Thousand and Seventeen. The commencement of the alleged contract is not clear. Further in paragraph 3 the period of employment is for two years, contrary to the heading of the contract PERMANENT EMPLOYMENT CONTRACT. The two-year contract was to end in 2014 as per this contract but it has been altered to look like it was to end in 2019, which



raises the issue of veracity of this document. The Appellant is required by law to keep employment records that are clear and beyond suspicion. The documents produced in this Court are fabricated and unreliable. The principle of freedom of contract between parties over a suspicious, illegal, and unlawful contract where an employee is underpaid cannot be appreciated. There is no credible evidence on record tendered by the Appellant.

44. That the Honourable Magistrate correctly held that the termination of the Respondent was unfair as the same was devoid of correct procedure, and fairness. These grounds of appeal does not stand. The issue of 27th September 2019 being the termination date as indicated in the letter from the Ministry of labour, can easily be discerned by any reasonable person from the narration that the Labour Officer mistook the day the Respondent left to go home being the 27th September 2019 as a termination date. Even in their own submissions dated 10th December 2024 on page 4 paragraph 15, the Appellant states that the Respondent had been granted unpaid leave on 30th September 2019 and was to report back on 16th October 2019. How is it possible then for the same Appellant to allege that the Respondents services were terminated on 27th September 2019 just because it is indicated in the letter from Labour office? The Appellant is being frivolous and malicious. The Appellant has not alleged anywhere in its pleadings that the Respondent failed to report to work on 23rd September 2019. There is no warning letter to suggest that the Respondent was involved in or violated any employment rules. The issue as to whether it was the Respondent or otherwise who withdrew money at an ATM in Mbale town on 23rd September 2019 is immaterial. The Respondent was at her place of work, this has not disputed by the Appellant.
45. In her statement, the Respondent states clearly that she went home on 27th September 2019 to check on her ailing mother. While in Kisumu on her way home she received a call from her sister that her mother had passed on. The Respondent filed further list of documents where Permit for Burial is one of the said documents. The name of the deceased on the Permit for Burial serial No. 1889993 is JESIKA JERUDO GENYO. Date of Death is 27/9/19 and sex of the deceased is female. My Lord, when the Appellant states that the Respondent does not know which parent died is being disrespectful to the dead and an affront to the intelligence of the lower and this Court. What the Appellant is referring to in the lower Court judgment is typing error which any reasonable person cannot doubt. It shows how malicious the Appellant can be.
46. The Appellant's witness Lucy Mutie the Managing Director states in paragraph 4 of her witness statement on page 26 of the Appeal Bundle that the Respondent absconded duty in September 2019. No particular date of absconding is given. The same statement is repeated in their lower Court submissions in paragraph 10 at page 46 of the Appeal Bundle. In their current submissions before this Court on page 4 at paragraph 16, the Appellant insists that the Respondent absconded duty without providing any evidence to the allegation or the date she absconded. Further, in paragraph 18 on page 4 of the Appellant Submissions, it alleges that the Respondent applied for unpaid leave days which was to start on 30th September 2019 and run up to 16th October 2019 when she was to report back to work but absconded. The Respondent reported to work on 16th October 2019 when her services were terminated and the same is alluded to by the Appellant in paragraph 19 in their submissions. The concoction and convoluted theory that the Appellant is trying to create does not hold as facts are very stubborn. For any party to rely on dismissal on account of absconding duty as the Appellant alleges, the party must provide evidence showing reasonable attempts made to contact the employee concerned. In her testimony, during cross-examination, Lucy Mutie on page 63 of the Appeal Bundle, stated that the Respondent absconded duty and she did not write to the Respondent to find out where she was though she had her contacts. The Appellant made no effort to trace the Respondent as per the case of Joseph Nzioka Vs Smart Coatings Limited (2017) e KLR as per respondent's submissions in the lower Court on page 35 and 36 of the Appeal Bundle. Further on page 36 in Simon Mbithi Mbane



Vs Inter Security Services Limited (2018) eKLR the Court stated, 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.

## Decision

47. A fair termination of employment is according to the provisions of section 45(2) of the *Employment Act* which states:- “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.”
48. The Court re-evaluated the evidence before trial Court(Selle v Associated Motor Boat Co. [1968] EA 123 ). The claimant stated she travelled home on a Friday 27<sup>th</sup> September 2019 and upon reaching Kisumu that night, she was informed the mother had passed and on Saturday, she called the boss. The Court noted in her statement the Respondent stated she did not need permission to travel on 27<sup>th</sup> September 2019 which was a Friday. She produced her mother’s burial permit which the date of death was not clear but was dated 28<sup>th</sup> September 2019(Page 21 ROA). The claimant produced as EC3 a document dated 24<sup>th</sup> October 2019 by labour officer at the Ministry of Labour and Social Protection addressed to the appellant. The Respondent had reported her claim.(page 11 of ROA) The labour officers are allowed to solve such disputes and issue remedies under section 49 of the *Employment Act*. The Court perused the EC3 document dated 24<sup>th</sup> October 2019 and established it stated that the appellant had employed the respondent effective January 2014 and terminated her services on the 27<sup>th</sup> of September 2019 without lawful cause. The Respondent submitted that there was an error on the report as on 27<sup>th</sup> September 2019 is when she travelled home.
49. The Court noted the trial Court did not address its mind on this document (EC3) yet it is a document from a public office produced by the Respondent. The trial Court focused on the oral testimony of the claimant without examining the documents produced in support of the claim. The Court finds this was material evidence on the termination. The Court in view of the document from the labour office where the Respondent reported her employment was terminated on the 27<sup>th</sup> September 2019 found that the trial Court erred in believing the testimony of the alleged termination of work on 16<sup>th</sup> October 2019. The claimant produced the document as her evidence. The document emanated from a public office, and the appellant admitted having received the same. The Court was not persuaded there was any error in the document as it was produced by the respondent who ought to have sought correction before producing it before the trial Court.
50. The Court was persuaded that the respondent left work on the 27<sup>th</sup> of September 2019 as per EC3 with no intention to return, hence absconding. In Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR the Court stated, “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.” The appellant submitted that the Learned Magistrate misdirected himself by finding the Appellant liable for unfair termination, despite clear evidence of the Respondent’s abscondment and misconduct. That the Respondent absconded from her duties and disregarded the notices issued



by the Appellant, including the show cause letter and the invitation to the disciplinary hearing. Her conduct demonstrated a blatant disregard for her contractual obligations. The Court on perusal of the proceedings found the Appellant's submissions of issuance of notices was based on untrue facts. At trial RW1, Lucy Mutie, during cross-examination told the Court that the claimant absconded duty and was never terminated. That she applied for leave and did not resume. RW1 said, "I did not write to the claimant to find out where she was. We had her contacts". (page 65 of ROA). There was no doubt that the Respondent absconded duty.

51. The Court found no evidence of compliance with section 41 of the *Employment Act* of notification of the respondent of the intention to terminate her services on account of absconding (Simon Mbithi Mbane Vs Inter Security Services Limited (2018)e KLR). Consequently, the Court on account of failure to comply with Section 41 the termination was unfair. The decision of the trial court on the unfairness of the termination of the employment of the respondent was upheld. Whether the trial Court erred in fact and law in reliefs awarded.
52. The Trial Magistrate Court delivered its Judgment on the 31<sup>st</sup> October, 2023 awarding the claimant a total sum of Kshs. 573,543.20/= together with cost of suit and interest. (Judgment at pages 66-74 of ROA). The amount was itemised as notice pay of one month salary Kshs. 15,608, unpaid September salary Kshs. 15,608, untaken leave Kshs. 63,031.50 and prorated leave of 2019 of Kshs. 9455.30, underpayment of salaries as per paragraph 4 of the claim, and compensation for unlawful termination of Kshs. 187,305.60

### **On the compensation**

53. The remedies of unfair termination are under section 49 (1) of the *Employment Act* to wit: "49 (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
  - a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
  - b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
  - c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." There is also a remedy of reinstatement and re-engagement where applicable. The Court may award any or all of the awards above upon finding unfair termination. The Court in the instant case established that the claimant absconded duty effective 27<sup>th</sup> September 2019 when she left for home as supported by the document of the Ministry of Labour (EC3). The RW1's evidence was also unshaken on the Respondent having failed to resume duty. The Court cannot reward misconduct, and the compensation equivalent of 12 months was unjustified and is set aside. For failure to comply with section 41 on procedural fairness, the Court upheld the award of Notice pay.



54. On the claim for untaken leave, the Respondent filed a leave form for 2018. The Respondent stated she never went for leave which was untrue taking into account the leave forms filed for 21 Days For 2018. The only leave due was for 2019 which is upheld for Kshs. 9455.30.

### **On claim for salary underpayment**

#### Appellant's submissions

55. The Learned Magistrate did not consider the Appellant's evidence, leading to an erroneous finding of underpayment. Clear evidence demonstrates that the Respondent was duly compensated and not entitled to payment in lieu of notice due to the absence of unfair termination. The Respondent had received her dues up to the final month before absconding from work. Furthermore, it is noteworthy that she did not complain to the Appellant of her underpayment as she agreed to the terms and conditions of the employment agreement.

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

56. Section 48 of the *Labour Institutions Act* provides Wages Order to constitute minimum terms of conditions of employment:-“48 (1) Notwithstanding anything contained in this Act or any other written law- (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement; (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms. (2) An employer who fails to- (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or (b) provide an employee with the conditions of employment prescribed in the order, commits an offence. (3) If an employer is found guilty of an offence under subsection (2), the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid”. In explaining continuing injury within the meaning of section 90 of the *Employment Act*, in *The German School Society & Another Vs Ohany & Another* (2023 KECA 894 (KLR) ), the Court of Appeal in paragraph 38 referred the Supreme Court of India applied the principle of "continuing wrong" and "recurring wrongs" it held in its opening sentence; "The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. Further in paragraph 69 line 4 of the above case states; Essentially, back pay is the term for wages that are owed to an employee for work done in the past, yet, for whatever reason, the employer withheld these wages from the employee's paycheck. Payment of back pay depends upon the facts and circumstances of each case. It, would, however, not be correct to contend that it is automatic. It should not be granted mechanically. The workman is required to plead and prima facie prove the claim.”
57. The respondent produced contract of Kshs. 6000 which was consistent with the claimant's position of salary. The appellant pleaded freedom of contract. The Court holds that in employment contracts, freedom of contract is not absolute and is subject of minimum wages as stated in Section 48 of the *Labour Institutions Act*(supra). The appellant did not dispute the tabulations under the various wages orders(paragraph 4 of the claim at page 5 of ROA). The Court found no basis to interfere with the awards of backpay which are upheld.



## **Conclusion**

58. In conclusion, the appeal is allowed partially. The Judgment and Decree of the Honourable Paul K. Rotich(SPM) delivered at Nairobi on the 1<sup>st</sup> November 2023 in Nairobi CMEL No. E657 of 2020 between the parties is set aside and substituted as follows:-

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

- a. A declaration that the termination of the claimant's employment was unfair.
- b. Notice pay of Kshs. 15608
- c. Unpaid September salary Kshs. 15608
- d. Prorated leave 2019 Kshs. 9455.30
- e. Underpayment as pleaded in paragraph 4 of the claim  
The total amount awarded for KSHS. 323,206.10
- f. Costs and interest at Court rates from the date of judgment until payment in full.

59. Each party to bear its own cost in the appeal.

It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant -Vuchocho

Respondent – Mokaya

