



REPUBLIC OF KENYA



**Matsyi v Solo (Employment and Labour Relations Cause 261 of 2017)  
[2025] KEELRC 862 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 862 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 261 OF 2017**

**JW KELI, J  
MARCH 14, 2025**

**BETWEEN**

**MISS SHEILA KASITI MATSYI ..... CLAIMANT**

**AND**

**MISS MWIKALI SOLO ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit against the Respondent vide a statement of claim dated 10<sup>th</sup> February 2017 supported by the Claimant's Verifying Affidavit sworn on even date seeking the following reliefs:-
  - a. An order to pay the Claimant a sum of Kshs. 336,697.45/=.
  - b. Cost of Action.
  - c. Interest at Court's rate until the amount is paid in full.
  - d. Any other relief the Court may seem fit to grant.
2. The claim was filed together with the list of documents, bundle of documents, list of witnesses and Claimant's witness statement all dated 10<sup>th</sup> February, 2017.
3. The Respondent entered appearance through their Advocates, Ongeku & Associates on the 22<sup>nd</sup> May 2019 and filed a Response & Counterclaim dated 22<sup>nd</sup> May 2019 together with the Respondent's witness statement, list of witnesses, list of documents of even date, and the bundle of the documents of even date.
4. The Claimant filed a list of agreed issues dated 19<sup>th</sup> August 2019.



## Hearing and Evidence

5. The claimant's case was heard on the 19<sup>th</sup> December, 2024. The Claimant testified on oath and produced her evidential documents under the Claimant's list of documents dated 10<sup>th</sup> February, 2017 as Exhibits 1-5 that the court eventually adopted as the CW 1's evidence and her witness statement of even date. The Claimant was cross-examined by counsel for the Respondent, Mr. Munyendo, and thereafter, the Claimant's case was marked as closed.
6. The Respondent's case was heard on even date. Mwikali Solo the Respondent gave sworn testimony as DW1. She adopted her witness statement dated 22<sup>nd</sup> May, 2019 as her evidence in chief. On even date the witness was cross-examined by counsel of the claimant Ms. Munyua and was re-examined. The defence case was marked as closed.

## The Claimant's case in summary

7. The Claimant stated that on about 3<sup>rd</sup> August, 2013. the Respondent employed the Claimant as a house servant at a monthly salary of Kshs. 5,500/= per month for 3 months up to 31<sup>st</sup> October, 2013 against Kshs. 9,780.75/= per month as contained in legal notice No. 197 of 1<sup>st</sup> May, 2013 and therefore the Claimant averred that she was underpaid by Kshs. 4,280.95/= per month for 3 months which is Kshs. 12,842.85/=.
8. Further, the Claimant averred that from 1<sup>st</sup> November 2013, the Respondent increased the salary to Kshs. 6,000/= per month upto 31<sup>st</sup> March, 2014(5 months) against Kshs. 9,780.95/= as contained in Legal Notice No. 197 of 1<sup>st</sup> May, 2013, and that she was underpaid by Kshs. 3,780.95/= per month for 5 months for 5 months which is Kshs. 18,904.75/=.
9. The Claimant further avers that from 1<sup>st</sup> April 2014, the Respondent increased the salary to Kshs. 6,500/= per month up to 30<sup>th</sup> November 2014 (8) months against Kshs. 9,780.95/= in legal notice No. 197 of 1<sup>st</sup> May, 2013 and therefore the Claimant was underpaid for 8 months in the sum of Kshs. 26,247.60/=.
10. That on 1<sup>st</sup> December, 2014 the Respondent increased the salary of the claimant to Kshs.7,000/= per month up to 30<sup>th</sup> April, 2015 (5 months) against Kshs. 9,780.95/= as per legal notice No. 197 of 1<sup>st</sup> May, 2013 and therefore the Claimant contended that she was underpaid by Kshs. 3,280.95/= per month for 8 months which is Kshs. 13,904.75/=.
11. From the 1<sup>st</sup> May, 2015 Legal Notice No. 117 the salary of the Claimant was supposed to be paid Kshs. 10,954.70/= per month while the Respondent was paying the Claimant a salary of Kshs. 7,000/= per month up to 29<sup>th</sup> December, 2016 when the Respondent unfairly terminated the Claimant's services and the Claimant contended that she was underpaid in the amount of Kshs. 79,094/=.
12. During cross- examination, the Claimant admitted that her first salary was Kshs. 5,500 per month which was increased to Kshs. 6,000 in November 2013 and when leaving work her salary was Kshs. 7,000/= and that she served for a period of three years from the year 2013- 29<sup>th</sup> December, 2016.
13. Further she testified that during her employment period she never complained about the wages.
14. On re-examination, the Claimant stated that she did not complain about her salary as they had agreed with the Respondent and was not given reason for termination and the Respondent did not pay NSSF.



### **Respondent's case in summary**

15. Conversely, in the Respondent's Response and Counterclaim dated 22<sup>nd</sup> May, 2019, the Respondent denied that she employed the Claimant as a house help and that she underpaid the Claimant.
16. Further, the Respondent contended that the Claimant terminated the contract of employment without giving the Respondent notice on 26<sup>th</sup> December, 2016 subjecting the Respondent to mental anguish.
17. The Respondent averred that it was mutually agreed that the Respondent was to provide shelter at the cost of Kshs. 5,000/= per month and food at the rate of Kshs. 6,000/= per month to the Claimant and the same to be considered part of the monthly salary and pay her the sum of Kshs. 8,000/= which sum was increased to Kshs. 10,000/= by the time the Claimant quit without notice.
18. The Respondent contended that she paid the Claimant her salary in full and gave the Claimant two(2) weeks leave during April, August and December holidays every year for the period she worked for the Respondent.
19. During the hearing, the Respondent testified that her agreement with the Claimant was oral, that she lived with the Claimant and provided food at her cost.
20. Further the Respondent testified that the Claimant took leave during the August and December holidays where she would work less, she would take two weeks leave depending on their arrangements.
21. The Respondent further stated that on 23<sup>rd</sup> December, 2016, the Claimant proceeded for leave and called the Respondent informing her that she would not return to work. That she packed the Claimant's belongings and left them at the security gate with a note. The Respondent contended that the Claimant left work without giving the Respondent notice.
22. The Respondent prayed that the Claimant's claim be dismissed with costs and that the Claimant reimburse the Respondent one(1) months' salary in lieu of notice.

### **Written Submissions**

23. The parties filed written submissions after closure of the hearing. The claimant's written submissions dated 13<sup>th</sup> January, 2025 were drawn and filed by Chwero & Company Advocates. The Respondent filed their Written Submissions dated 15<sup>th</sup> January, 2025 through their counsel Mapesa & Mapesa Advocates.

### **Determination**

#### **Issues for determination**

24. The claimant in written submissions raised the following four (4) issues for determination namely:- Whether the termination from employment was unfair and unlawful, whether the claimant is entitled to the reliefs sought, whether the Respondent has proved her counterclaim, and whether the respondent is entitled to the relief sought in her counterclaim.
25. Conversely, the Respondent raised two(2) issues for the courts determination namely: whether the Respondent unlawfully dismissed the Claimant from employment; and whether the Claimant is entitled to the reliefs sought.



26. The court returned that the parties were in agreement that the issues for determination in the suit were :-
- a. Whether the termination from employment was unfair and unlawful,
  - b. Whether the claimant is entitled to the reliefs sought,
  - c. Whether the respondent is entitled to the relief sought in her counterclaim.

**Whether the termination from employment was unfair and unlawful,**

27. The threshold for fair termination of employment against which the Court determines claims for unfair termination is according to the provision of section 45(2) of the Employment Act to wit:-“45. Unfair termination
- (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 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.”
28. Fairness as per section 45(2) (supra) has two components, substantive fairness in terms of existence of valid reasons related to the employee’s conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer. The prove of fair termination of employment as according to section 47(5) of the Employment Act to wit:- “(5) 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.” The second component is procedural fairness under section 41 of the Employment Act.
29. The court concluded there was an employment relationship between the parties. According to section 47(5) of the Employment Act (supra) the claimant had the burden to prove not only that her employment was terminated but also the termination was unlawful and unfair for the burden to pass to the respondent to justify the reason for the termination and prove procedural fairness under section 43, 41 and 45(2) of the Employment Act (Pius Machafu Isindu v Lavington Security Guards Limited (2017)e KLR.) The claimant pleaded she was unfairly terminated. On how the termination occurred, during cross-examination the claimant told the court that the respondent called her to say her services as house-help were no longer needed. That the Respondent asked her to pick her belongings. The claimant admitted that those words were not in her pleadings. The Claimant admitted that when leaving for Christmas holiday the same had been approved by the respondent. That the leave was for her to rest being Christmas period. She did not have the alleged message of having been told to stop working before court. The claimant had proceeded on leave on the 23<sup>rd</sup> December.
30. During cross-examination the respondent told the court she never terminated the services of the claimant. It was the claimant who terminated their verbal agreement. The Respondent had no proof of having been called by the claimant on the 26<sup>th</sup> of December 2016 to the effect of not returning to work.



She confirmed having texted the claimant after the claimant's call of 26<sup>th</sup> December that she would inform her on picking her belongings. The respondent worked as a cabin crew. The claimant took leave when the schools closed as the Respondent took her kids to her brother's house or her sister would be in the house. On re-examination, the respondent told the court that theirs was an oral engagement and no records were kept. The claimant came back later to bring a letter from labour consultant but not to ask about her work.

31. The court returned that the relationship between the parties was amicable as at the time of the claimant being granted leave on the 23<sup>rd</sup> of December 2016. That there was no basis for the court to find that the respondent would have terminated the employment as claimed. The parties operated on verbal agreements. The claimant had the burden to prove she was terminated (section 47(5) of the Employment Act). The Claimant could have produced the said call logs of 26<sup>th</sup> December to prove it was the employer who called her. On a balance of probabilities the court found that the claimant did not prove her services were terminated by the Respondent. The issue of procedural fairness did not arise in the circumstances.

### **Whether the claimant is entitled to the reliefs sought.**

#### **Underpayment of salary.**

32. The claimant led evidence of underpayment during entire period of employment. That she was paid in violation of minimum wages. She was employed by the respondent as house help on or about 3<sup>rd</sup> August 2013 at rate of Kshs. 5500 and terminated at Kshs. 7000 in December 2016. She relied on Minimum Wage Orders under Legal Gazette Notice Nos. 197 of 1<sup>st</sup> May 2013 and Legal Notice No. 117 of 1<sup>st</sup> May 2017 stipulating minimum wages of 9780.75 and Kshs. 10954.70 respectively. The computations were in paragraph 4 of the claim totalling Kshs. 150,993.95. Section 26(2) of the Employment Act provides as basic term of employment payment of wages as regulated to wit:- "(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply." The salary of a house help position is regulated under the minimum wages regulations as issued from time to time by the Minister in charge of labour docket. In the instant case there existed Minimum Wages Orders Legal Gazette Notice Nos. 197 of 1<sup>st</sup> May 2013 and 117 of 1<sup>st</sup> May 2017 stipulating minimum wages of 9780.75 and Kshs. 10954.70 respectively. It proved to the court the claimant had a case of underpayment. The respondent at cross-examination on being asked if she paid the claimant as per the law stated that she paid as they had agreed. According to the Respondent they agreed with the claimant she would provide food and shelter as stated in paragraph 4 of her witness statement :- "That we mutually agreed that I was also to provide shelter at a cost of Kshs.5000 per month and food at the rate of Kshs. 6000 to the claimant and the same was to be considered as part of monthly payment" In submissions the respondent contended that the claim for underpayment was time barred under section 90 of the Employment Act as the claims ought to be raised within one year of cessation. Section 89(formerly 90) of the Employment Act states:- "89. Limitations

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."



33. The Court of Appeal has since settled the definition and application of continuing injury in claims in *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) Neutral citation: [2023] KECA 894 (KLR to wit:-
- ‘40. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant’s argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.’
- The court in setting aside the award for back pay observed in part:- ‘69. Next, we will address the claim for back pay in respect of which the learned judge awarded Kshs. 4,975,360/= in her ruling following an application for review filed by the respondent. Back pay can be defined as the difference between the amounts of pay a worker is owed versus what they actually received. 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.’
34. The claim for underpayment of wages and salary falls under a continuing injury claim hence ought to be filed within 12 months next after cessation. In the instant case, the date of cessation was 26<sup>th</sup> December 2016 when the employment of the claimant terminated with the respondent. The claim was filed on the 13<sup>th</sup> February 2017 within 12 months of termination thus not time barred.
35. On the counterclaim, the law does not allow an employer to negotiate with an employee for payment of salary less than the prescribed minimum wages. Under section 26 of the *Employment Act* the court will uphold the wages prescribed under the Wages Regulations (supra). The court returned that the claimant proved her case of underpayment of salary as computed under paragraph 4 of the claim for the total sum of Kshs150,993.95. The claim is allowed.
36. On the claim for leave, the court finds that the employment of domestic workers in private residences is flexible and mainly verbal. The court determined that it was not unreasonable for the parties to have agreed orally and for the respondent to have failed to keep records of leave. This rationale aligns with the employers of house helps as outlined in the test from *British Leyland (UK) Ltd v Swift*. The respondent stated that the claimant was on leave every two weeks during the December holidays and in April when schools were closed. The minimum statutory leave is 21 days. The claimant admitted she was on leave from December 23rd, 2016 when the employment terminated. The court returns that on balance of probabilities, the respondent’s position on the leave was true.
37. Service pay. The claimant referred to severance pay. The pleadings alluded to a case of service pay. There was no evidence of payment of NSSF or gratuity. Section 35 of the *Employment Act* provides for service pay as follows:- “35(5) 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 claimant sought service pay for 3 years at rate of 15 days for each worked. The employment period from August 2013 to December 2016 was not disputed. The Respondent’s advocate cross-examined the claimant on the year 2013 payments. The court returns that the claimant was entitled to service pay as sought and the same is awarded at Kshs. 18,960.05.

38. All other reliefs fail as the termination of the employment was held to have been by the claimant.

**Whether the respondent is entitled to the relief sought in her counterclaim.**

39. On the counterclaim by the Respondent for shelter and alleged food, the court returns that the claimant was entitled to housing a basic condition of employment under section 31 of the Employment Act to wit:- “31. Housing

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.” The Claimant was not paid housing allowance and the claim fails. The claim for food was not proved. The counterclaim fails.

**Conclusion**

40. In conclusion the claim dated 10<sup>th</sup> February 2017 is allowed as follows:

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

Payment of underpaid wages of Kshs. 150,993.95

Service pay of Kshs. 18,960.05

Costs of the suit.

41. Stay of 30 days.

42. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH , 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Claimant-Ms Njenga

Respondent - absent

