



Paul v Kantaria t/a Commercial Registrars (Employment and Labour Relations Appeal E227 of 2023) [2025] KEELRC 867 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 867 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E227 OF 2023**

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

BETWEEN

HELLEN MWENDE PAUL APPELLANT

AND

LINA KANTARIA T/A COMMERCIAL REGISTRARS RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Rawlings Liluma Masiega (SRM) delivered at Nairobi on the 13th October, 2023 in Nairobi MCELRC E1115 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and Orders of the Honourable Rawlings Liluma Masiega (SRM) delivered at Nairobi on the 13th October, 2023 in Nairobi MCELRC No. E1115 of 2021 between the parties filed a Memorandum of Appeal dated 2nd November, 2023 seeking the following orders:
 - i. That the Appeal be allowed with all incidental costs to the Appellant;
 - ii. Judgment of the lower court be set aside entirely and Judgment be entered in favor of the Appellant as prayed for in the Memorandum of Claim dated 15th June, 2021.

The Grounds of the Appeal

2. The Learned Magistrate erred in law and in fact when he found that the Appellant was not unlawfully terminated.
3. The Learned Magistrate erred in law and in fact when he found that the Respondent's counterclaim was merited.



4. The Learned Magistrate erred in law and in fact when he found that the Respondent was entitled to notice pay amounting to Kshs 42,500/=.
5. The Learned Magistrate erred in law and in fact when he found that the Respondent was entitled to loan advance amounting to Kshs. 30,000/=.
6. The Learned Magistrate erred in law and in fact by failing to correctly evaluate the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.
7. The Learned Magistrate erred in law and in fact by failing to consider the written submissions of the Appellant in arriving at his Judgment.

Background to the Appeal

8. The Claimant/Appellant filed claim against the Respondent vide a memorandum of claim dated 15th June, 2021 seeking the following orders:-
 - a. A declaration that the termination of the Claimant's employment was illegal and unfair for want of a fair hearing or any hearing at all;
 - b. A declaration that the Respondent had no valid reason to terminate the Claimant's employment and that her termination was unfair, unlawful and unjustified;
 - c. An order directing the Respondent to avail a Certificate of Service to the Claimant;
 - d. Unpaid salary for May, 2021 Kshs. 45,375/=
 - e. Service gratuity at 15 days for each year worked (2 years) Kshs. 60,500/=
 - f. Notice Pay Kshs.60,500/=
 - g. Leave days balance for the year 2020 (9 days) Kshs. 27,225/=
 - h. Leave days for the year 2021 (7 days) Kshs. 21,175/=
 - i. Unpaid salary increment from January 2020 to April, 2021
 - j. From January 2020 to Janaury, 2021 underpayment of
 - k. Kshs 22,500 and from February 2021 to April 2021
Underpayment of Kshs. 18,000/= Kshs. 346,500/=
 - l. 12 months compensation for unfair termination Kshs. 726,000/=
Total Kshs. 1,287,275/=
 - m. Interest on (d) to (m) above at Court rates until payment in full
 - n. Costs of the suit and interest thereon
 - o. Any other relief as the court may grant
9. The Claimant filed her verifying affidavit dated 9th June, 2021, Witness statement and list of documents all dated 15th June, 2021 together with the bundle of documents (see pages 9-21 of ROA).
10. The claim was opposed by the Respondent who entered appearance and filed a Respondent's Reply to Memorandum of Claim & Counterclaim dated 16th July, 2021 (Pages 22-30 of ROA), Respondent's



list of witnesses, Respondent's Witness Statement of Lina Kantaria and list and bundle of documents all of even date (Pages 31-35 of ROA).

11. The Claimant responded to the Respondent's pleadings by filing a Reply to the Reply to Memorandum of Claim and defence to Counterclaim dated 23rd July, 2021 and simultaneously filed a Defence to Counterclaim and Set off of even date. Further, the Claimant filed its List of issues and further List of Documents dated 3rd July, 2021(Pages 36-45 of ROA).
12. The Respondent further filed a Substituted List of Witnesses and a Substituted Witness Statement of Nellie Wanjiku Mwirikia dated 19th May, 2023(Pages 53-55 of ROA).
13. The Claimant further filed a Further Supplementary List of Documents dated 22nd May, 2023 and the Respondent a Further List of documents dated 25th May, 2023(Pages 56-74 of ROA).
14. The claimant's case was heard on the 29th May, 2023 where the claimant testified in the case, produced her documents, and was cross-examined by counsel for the Respondent Mr. Njuru (pages 84-87 of ROA).
15. The Respondent's case was heard on the same date where Ms. Nellie Wanjiku Melikua testified on behalf of the Respondent. She relied on her filed witness statement. She was cross-examined by counsel for the claimant Ms. Mr. Gathu(pages 88-90 of ROA)
16. The parties took directions on filing of written submissions after the hearing. The parties complied.
17. The Trial Magistrate Court delivered its Judgment on the 13th October, 2023 Partially in favour of the Claimant granting the Claimant Kshs. 42,500/= salary for the month of May, 2021. Further, the Court allowed the Respondent's Counterclaim and awarded the Respondent a total sum of Kshs. 72,500/= consisting of the balance of the loan advanced by the Respondent to the Claimant and Notice Pay. (Judgment at pages 77-80 of ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties complied.
19. 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."
20. 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

21. The Appellant/Claimant submitted the following issues for the court's determination namely:
 - a. Whether there was a valid and justifiable reason for termination of the Appellant's employment;
 - b. Whether the termination of the Respondent's employment was procedurally lawful and fair;
 - c. Whether the trial court arrived at the proper determination.
22. The Respondent submitted on the merits of the Appeal.
23. The court having perused the grounds of appeal was of the considered opinion that the issues placed before the court on appeal for termination were as follows:-
 - a. Whether the trial erred in finding there was case of unfair termination.
 - b. Whether the trial court erred in grant of reliefs.

Whether the trial erred in finding there was case of unfair termination.

24. The thresh hold 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.”- 25. Fairness as per section 45(2) (supra) has two components, substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer. On the issue the trial court held that the appellant was not terminated from employment but absconded. That she was issued with notice to show cause letter dated 24th may 2021 but failed to reply.

Appellant's submissions

26. The appellant relied on the decision in *George Musamali v G4S Security Services Kenya Ltd* [2016] e KLR on fair termination standards where the court stated that:-“A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be in accordance with the procedure laid down in the human resource manual or set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves.” The appellant submitted that the Respondent failed to meet these standards by far. There was no valid reason for the termination. The Appellant had



- proceeded on authorized sick leave. The Respondent had informed the Appellant via WhatsApp that she should bring a doctor's note when she reported back (See page 15 of the Record of Appeal). The Appellant dutifully did this. She reported back with evidence of having sought medical attention. She had evidence of the medical attention (see pages 18-21 of the Record of Appeal).
27. The Respondent, in its defence to the suit and not anywhere else, claimed that the Appellant could not account for her time away from the office on 13th, 14th, 15th, 22nd and 23rd May 2021. The claim of absence does not pass the test of a valid reason and is absurd for the following reasons:-
- a. By the Respondent's own admission, the Appellant was away on authorized off on 13th May 2021 (see the cross examination of the Respondent's witness at page 89 of the Record of Appeal on the second paragraph)
 - b. 14th May 2021 was a public holiday to mark idd ul fitr (See page 51 of the Record of Appeal)
 - c. 15th May 2021 and 22nd May 2021 were Saturdays. 23rd May 2021 was on a Sunday. These are facts of which the court can look up and take judicial notice of.
 - d. The Claimant's ordinary days of work were Monday to Friday (See clause 6 of her contract of employment at page 10 of the Record of Appeal).
 - e. The Respondent did not adduce any evidence that they had required the Appellant to work on weekends (see the cross examination of the Respondent's witness at page 89 of the Record of Appeal on the second paragraph)
28. The Respondent chose to terminate her employment verbally. She clearly had no reason to. The learned magistrate erred when he failed to consider whether the Respondent had a valid reason for terminating Appellant's employment. Had he done so, he would have found that the Respondent did not have a valid reason to terminate the Appellant's employment.
29. On Whether the termination of the Respondent's employment was procedurally lawful and fair the Appellant submitted that the Learned Magistrate erred in fact when he found that the Appellant was issued with a show cause letter which she failed to respond to. During cross-examination, the Respondent's witness (DW 1) Nellie Wanjiku Melikua was unable to explain when the show cause letter was issued and why the same was not sent via email (see page 89 of the Record of Appeal). This is in spite of confirming that the Respondent had the Appellant's email and phone contacts. Additionally, the Appellant and her Advocates variously corresponded with the Respondent. In the correspondence, the Appellant was categorical that she had been terminated without due process. At no point did the Respondent raise the issue of an unresponded show cause letter. Respondent had so many opportunities to raise the issue of a show cause letter that was allegedly issued to the Appellant and confirm its receipt, but she did not. For instance, it is not in dispute that the Appellant wrote an email dated 26/05/2021 clearly stating that the Respondent had terminated her employment verbally seeking her terminal dues. The Respondent did not deny having received the said email. She also never responded to the said email by raising the issue of a show cause letter in response to that email. (See page 14 of the Record of Appeal) Moreover, during the Respondent's correspondence with the Appellant's Advocates she did not mention any show cause letter that was allegedly issued to the Appellant (see pages 43-45 of the Record of Appeal). Therefore, the only logical explanation to the Respondent's failure of bringing up the show cause letter is that it was an afterthought and that the Appellant was never issued with any show cause letter. In any event, the Respondent never invited the Appellant for a disciplinary hearing.
30. The appellant submitted that based on the foregoing, the trial court arrived at a grossly erroneous determination that was based on gross misapprehension of the facts and the law applicable. There



was no basis at all to dismiss the Appellant's claim. Conversely, there was every reason to allow the Appellant's claim and dismiss the Respondent's counterclaim.

Respondent's submissions

31. The Respondent submitted that the Appeal was ripe for dismissal since:-
- i. The Appellant was absent from duty without leave or other lawful cause and without communication to and authority of the Respondent.
 - ii. The Appellant never proved that she presented to the Respondent a Certificate of Incapacity from a duly qualified medical practitioner as required by section 30 (1) of the [Employment Act, 2007](#) and Clause 15 of the contract of employment in order to entitle herself to sick leave for the period she was absent from duty.
 - iii. The Appellant did not prove that she was terminated by the Respondent since upon being issued with a Notice to show cause why she had been absent from duty she refused to sign the same and respond thereto but instead wrote a terse email on 26th May 2021 demanding for payment of her terminal dues by Friday 28th May 2021 at 9:00 a.m.
32. The Respondent submitted that it was not in contention that the Respondent engaged the Appellant on or about February 2019 where she executed a contract of employment dated 4th April 2019 as an Assistant Company Secretary at a gross consolidated monthly salary of Kshs thirty-five thousand (35,000/=) (see pages 10 – 13 of the record of appeal) It was not in contention that the Respondent absented herself from duty from 17th May 2021 to 21st May 2021. Under Section 30 (1) of the [Employment Act](#), an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner. The above provisions are re-iterated in the Appellant's employment contract at Clause 15 which states that for one to qualify for sick leave he or she must have proof from a medical practitioner that he is unfit to work. The effect of the aforementioned is that burden is placed on the Appellant to notify the Respondent of the reasons for his absence in order to be entitled to sick leave. These was well expounded in the case of *Simon Ngugi Kamau v Silpack Industries Limited* [2015] eKLR;

“... Thus there are parameters set on the enjoyment of sick off. Where the employee is sick and requires medical attention, such an employee is entitled to take time off with full pay to seek such medical attention. Such an employee must however produce a certificate of any incapacity/sickness/illness to the employer, which certificate should be signed by a qualified medical practitioner. Such a medical certificate should as of necessity note the nature of illness/sickness that the employee is being treated for or with regard to the privacy of such an employee, the certificate note as appropriate.” The court further held that:- “Absence from work is an issue so serious that an employer should address. Where such absence is caused by sickness, then the employer should take appropriate action to support the affected employee. Where an employee becomes sick and requires medical attention and has to be absent from work, and then they must disclose their whereabouts and allow the employer to interrogate such absence. The production of a handwritten medical note however urgent and whatever sickness or ailment an employee is suffering from, where the employer demands that proper certification be produced to confirm such illness or sickness to confirm the absence or need for support to such an employee, then such an employee must oblige. The practice that any medical note, treatment card from any establishment is acceptable is a notion that should be discarded.” That the learned Magistrate correctly found that Respondent had not



discharged her burden of proof as required in law. The burden of proof in employment claims is provided for under Section 47 (5) of the *Employment Act* which provides that the employee has 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.

33. Addressing this issue, the court in *Josephine M. Ndungu & others v Plan International Inc (2019) eKLR* held that section 45 of the *Employment Act* suggests two burdens: “the employee has the burden of proving the unlawfulness of the termination and the employer has the burden of justifying the termination.” Though the Appellant purported to have been unwell on the days she was absent she did not demonstrate that she ever presented to her employer a Certificate of Incapacity from a duly qualified Medical Practitioner as required under section 30(1) of the *Employment Act* 2007 for her to be entitled to sick leave for the period she was absent from duty. The Appellant during trial produce in evidence Medical reports from “Ruaka Neema Uhai Hospital” and “Geneva Medical Services”. By her own admission the above mentioned documents were not Certificate of Incapacity within the meaning of Section 30 (1) of the *Employment Act*. A perusal of document from “Ruaka Neema Uhai Hospital” shows that it is addressed “to whom concern” and not to her employer. Further the letter merely states that the Appellant was treated on 16th May 2021 at the hospital. It does not state the details of the seriousness or otherwise of the illness being treated or state that she was unfit to work. The document from “Geneva Medical Services” appears to be a treatment notes from a clinic whose authenticity is in question. Both the above documents were never presented to the Appellant’s employer and the Respondent came across the documents when they were served with the suit papers. In cross-examination, the Appellant admitted that she never presented the documents to her employer.
34. The respondent submitted that the drafters of the law were very clear on the documentation required to substantiate a sick leave request. Nothing would have been easier than for the law to state that an employee is to present treatment notes and not a certificate of incapacity if this was the intention of the legislature. In any event, the Appellant did not prove that she notified her employer of her alleged sickness promptly as she was required under Section 30 (2) of the *Employment Act*, 2007. The treatment notes were dated 24th May 2021 and 17th May 2021 respectively and the Appellant did not explain why the same was not forwarded to the employer on the 17th May 2021 only for her to allege that she reported with the documents to work on 24th May 2021. No received stamp by the Respondent was exhibited to even confirm that the documents were represented to the Respondent on 24th May 2021. The Respondent is categorical it saw those document for the first time during litigation. Further, the said medical reports were filed vide a Supplementary List of Document dated 22nd June 2021. The initial List of Documents dated 15th June 2021 did not contain the same. In the circumstance, the medical reports were procured after filing the suit for purpose of bolstering the Appellant’s case.
35. The Appellant also exhibited some documents which she alleged to be WhatsApp communication between her and the Respondent. See pages 15 of the record of appeal however same have no probative value and ought to be disregarded for reasons: -
 - a) The said document is not a screenshot of WhatsApp message conversation between the parties and does not show the phone numbers of the author or recipient.
 - b) The said document is to be understood to have emanated from or printed out from an electronic device (phone therefore ought to comply with provisions of section 106B (1) and (2) of the *Evidence Act*, however no certificate on electronic evidence as envisage d in the above provisions was produced rendering the Appellant’s evidence unreliable, incredible and inadmissible.



- c) To this regard the respondent relied on *Nancy Muthoga v Chandarana Supermarket* (2019) eKLR wherein the Learned Judge ruled that WhatsApp communication tendered in court without compliance with provisions of Section 106 B (1) and (2) of the *Evidence Act* is inadmissible and unreliable. On 24th May 2021 when the Appellant reported to work the Respondent's witness testified the Appellant was issued with a show cause letter dated 24th May 2021 which required her to explain why disciplinary action should not be taken against her for being absent from her appointed place of work for 11 days without leave or other lawful cause, and without communication to and authority of the Respondent contrary to Clause 12 of her employment contract, see page 11 of the record as well as Section 44 (4)(a) of the *Employment Act*, 2007. 30. The Appellant received the notice to show cause letter but declined to sign a corresponding copy of the show cause letter and left the office only to write an email on 26th May 2021 alleging that she was terminated and rudely demanding for her final dues by Friday 28th May 2021 at 9:00 am, which was shortly followed by a demand letter the date 28th May 2021 on the day she was supposed to meet the Respondent. The Appellant did not adduce any evidence in support of her allegation that she was verbally terminated on 24th May 2021 and to this end the respondent relied on case of *Idd Salim Mwadele & 19 others v Kwale International Sugar Company Limited* where the court dismissed an appeal on the grounds that the Appellants had not proved their unfair dismissal. The court stated: - "Before any burden could shift to the respondent to justify the termination, the appellants were required to prove first, the conversion of their casual employment which they did not and then secondly, that their termination was unfair. All in all, the appellants had not made out their case to the required standard.... In the end, we are satisfied that the appellants failed to establish their case and therefore, the evidential burden under Section 47(5) of the *Employment Act* did not shift to the respondent. Accordingly, the appeal herein lacks merit and is hereby dismissed with costs."
36. The Respondent further submitted that the Appellant by terminating her employment contract denied herself process as she removed herself from the jurisdiction of the Respondent. She is estopped from alleging her employment was terminated let alone alleging the same was illegal and unfair. In the case of *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR it was held that an employer has no jurisdiction over his employee once he resigns and fortified its finding by decision of the Labour Court of South Africa, in *Mtati v. KPMG (Pty) Ltd* (2017) BLL 315 (LC) where the Court held; - "where an Employee tenders resignation immediately, the Employer is immediately deprived of jurisdiction to continue with the disciplinary process. Resignation takes effect immediately. Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority" That the Learned Magistrate's finding that the Respondent was entitled to notice pay was well-reasoned. The Court guided by the case *Kenneth Onialo v Majlis Resort Lamu t/aMajlis Lamu Ltd* [2022] eKLR wherein the court held; "As observed in the judgment, the Claimant resigned without notice to the Respondent in terms of section 35 of the *Employment Act*. Accordingly, the Claimant is obligated to pay the Respondent an amount equivalent to the Claimant's twenty-eight (28) days' salary in lieu of notice. This represents Ksh. 74,666/=."
37. The Respondent further submitted that at the time of her resignation the Claimant was earning a salary of Kshs 42,500/= and the allegation that there was a promise to verbally increase to her salary to Kshs 60,000/= was not substantiated. The appellant admitted on cross-examination that she never made any demands for the same and further that she signed monthly vouchers/payslips certifying the correctness of her salary. See Appellant's pay slips at pages 59 to 73 of the record. Section 107 of the *evidence Act* states that; "i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. ii. When a person



is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” On the issue of the loan advancement, the Respondent submitted that the same should not be an issue as it was admitted by the Appellant in cross-examination.

Decision

38. The Appellant was employed on the 1st February 2019 and issued with a contract of service effective from 4th April 2019. The employment terminated on 20th May 2021 with a monthly salary of Kshs. 42,500. According to the appellant she fell ill on the 16th May 2021 and did not report to work. On the 17th May 2021 she notified her boss through WhatsApp of being unwell and stated that she would report on Tuesday which was the 18th May 2021. The boss replied “Hellen please bring doctor’s note.” The appellant replied-“ok.”(Page 15 of ROA).
39. The appellant contended that she reported on the 24th May 2021 and was told her contract had been terminated and to collect the letter of termination and terminal dues. The Respondent submitted that the appellant worked upto 12th May 2021 and absconded duties (page 22 of ROA). The respondent contended that the appellant was in breach of the clause 16 of the contract of service for failing to comply with the requirement for sick leave. That the medical notes filed in court were never given to the respondent and were only availed in court. That even then the said medical reports did not cover all the days the claimant was absent. That on 24th May the Appellant was issued with a notice to show cause and refused to sign only to send them an email on the 26th May 2021 alleging termination.
40. Having re-evaluated the evidence before the trial court it was evident to the court that the appellant failed to comply with clause 15 of her contract of service which stated- “for one to qualify for paid sick leave he or she must have proof from a medical practitioner that he is unfit to work..” The boss reminded the appellant of the same in the WhatsApp communication (page 15 of ROA). In the instant case the claimant relied on said WhatsApp communication with the boss on 17th May 2021 of being unwell and at cross-examination, the appellant conceded having told the boss she would report to duty on 18th May. The appellant never reported nor did she share the medical notes on sick leave with the said boss. Indeed, it was undisputed the said medical notes were never availed to the employer. Parties are bound by their contracts. The appellant breached the contract clause on sick leave. The appellant was not dismissed from work but absconded.
41. On the show cause letter there was no evidence of service of the same on the appellant. On absconding the employer must take steps to terminate the employment contract according to section 41 of the Employment Act. The show cause was not evidenced as served and there was no termination letter. The appellant was thus not entitled to notice pay under section 35 of the Employment Act. The Court on appeal finds there was no procedural fairness.

Whether the trial court erred in grant of reliefs.

42. The trial court found the employment was not terminated hence no compensation. On appeal that was still the position save for lack of procedural fairness and thus the award of notice pay for salary of 1 month Kshs. 42500. The notice pay awarded to the respondent is set aside.
43. The trial court awarded salary for May 2021 which is upheld. The court did not find evidence of NSSF or pension. There was no gratuity under the contract. Section 35 provides for service pay as follows:-“(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 court awards service pay to the appellant for the 2 completed years at 15 days for each year thus Kshs. 42,500.

44. On leave pay, no basis was laid for the same. On the alleged verbal increment the contract of service clause 16 provided for the manner of amendment. That all changes in the agreement were to be in writing. Parties are bound by their contract and the alleged verbal increment of salary is rejected.

45. On the counterclaim the reply to memorandum of claim did not have a prayer for the loan advance (page 27 of ROA) and the award of loan advance is set aside.

Conclusion

46. The appeal is allowed. The Judgment and Decree of the Honourable Rawlings Liluma Masiega (SRM) delivered at Nairobi on the 13th October 2023 in Nairobi MCELRC E1115 of 2021 is set aside and substituted as follows:-

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

Notice pay of Kshs. 42500

Salary for May 2021 Kshs. 42500

Service pay of Kshs. 42500 under section 35 of the *Employment Act*.

The counterclaim award is dismissed.

Costs and interest at court rate from date of judgment until payment in full.

47. Costs of the appeal to the appellant.

48. Stay of 30 days.

49. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Appellant: - Gathu

Respondent: Ms. Maina h/b Nchuru

Before Lady Justice J.W. Keli in Chambers on 17th March 2025

Court Order.

Issued under Rule 75 of the Employment and Labour Relations Court Rules (2024) which states:- “The Court shall, at the request of the parties or on its own



motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.”

The court noted an error on its own motion, being, the Respondent had filed before the lower court, a counterclaim dated 16th July 2021 (page 30 of ROA) which pleaded advanced loan of Kshs. 30,000. The appellant admitted the same. The award by the trial of loan advance of Kshs. 30,000 is upheld as set off from the total awarded amount.

The judgment dated 14th March 2025 of the court at first appeal is amended in paragraph 30 as follows:-

The appeal is allowed. the judgment and decree of the honourable rawlings Liluma Masiega (SRM) delivered at Nairobi on the 13th October, 2023 in Nairobi MCELRC E1115 of 2021 is set aside and substituted as follows:-

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

Notice pay of Kshs. 42500

Salary for May 2021 Kshs. 42500

Service pay of Kshs. 42500

Total payable amount Kshs. 127,500 less set off Kshs. 30,000 loan advance.

Costs and interest at court rate from the date of judgment until payment in full.

Costs of the appeal to the appellant.

It is so Ordered.

DATED, SIGNED, THIS 17TH DAY OF JANUARY, 2025.

J.W. KELI,

JUDGE.

IN CHAMBERS

