



**Wachira v Mwaura t/a Rehoboth Computer Training Center (RCTC) (Appeal E030 of 2023) [2025] KEELRC 819 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 819 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
APPEAL E030 OF 2023  
AN MWAURE, J  
MARCH 7, 2025**

**BETWEEN**

**HENRY KINYUA WACHIRA ..... APPELLANT**

**AND**

**GEORGE MWAURA T/A REHOBOTH COMPUTER TRAINING CENTER  
(RCTC) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable Bildad Ochieng, Chief Magistrate delivered on 28th September 2023 in Nakuru MCELRC No. 88 of 2020)*

**JUDGMENT**

1. The Appellant, being dissatisfied by the judgment and decree of the Honourable Chief Magistrate Bildad Ochieng, filed this appeal vide a Memorandum of Appeal dated 17<sup>th</sup> October 2023 on the grounds that: -
  1. The learned magistrate erred in law and in fact in dismissing the Appellant's case without appreciating in totality the overwhelming evidence on record in support of the Appellant's case.
  2. The learned magistrate erred in law and, in fact, in declining to make an award of notice pay, compensation for unlawful termination, underpayment and normal overtime dues in favour of the Appellant despite overwhelming evidence in support of the Appellant's case.
  3. The learned magistrate erred in law, and in fact, the Appellant had not proved his claim of notice pay, compensation for unlawful termination, underpayment and normal overtime dues to the required standards, contrary to the evidence on record.
  4. The learned Magistrate erred in law and, in fact, in failing to consider the Appellant's submissions.



2. The Appellant prays that:
  1. That the judgment/decreed of the Honourable Court dated 28<sup>th</sup> September 2023 be reviewed and or set aside.
  2. That the costs of this appeal be borne by the Respondent.
3. This appeal was disposed of by way of written submissions.

### **Appellant's submissions**

4. The Appellant submitted that there was no contention that the Respondent employed him as a computer tutor. However, he was not accorded a fair hearing by the Respondent during his termination, which violated the principles of natural justice. The Appellant submitted that he was not given reasons for his termination of employment, as well the procedure not being followed, citing Sections 41 and 45 of the *Employment Act* in support of that proposition.
5. The Appellant argued that the procedure was that that he was issued with a notice to show cause letter as to why disciplinary action should not be taken against him by the Respondent. He also argued that charges ought to have been preferred against him to allow him to respond and be accompanied by a colleague of his choice to attend the disciplinary hearing to know the reasons for his termination. The Appellant submitted that substantive justification and procedural fairness were not followed, and he was entitled to Kshs.263,746.20/= as compensation for 12 months for unfair termination. The Appellant relied on the cases of National Bank of Kenya V Samuel Nguru Mutonya (2019) eKLR and Florence Wambui Gitau Eclipse International (2019) eKLR in support of that proposition.
6. The Appellant submitted that he is entitled to one month of salary in lieu of notice amounting to Kshs.21,978.85/= since he was unfairly terminated. The Appellant relied on Section 35(1)(c) of the *Employment Act* which provides that an employer must pay an employee the equivalent of one's month wages as compensation providing the required notice period and cited the case of Kariki Limited V Karimi [2024] KEELRC 217 where the court awarded notice for unlawful termination of employment.
7. The Appellant submitted that he is entitled to underpayment as he was underpaid. The Appellant submitted that his recommendation letter dated 9<sup>th</sup> January 2020, which classified him as a general clerk and the said underpayment was calculated amounting to Kshs.1,095,467.10/= relying on Legal Notice No. 36 of 1<sup>st</sup> May 2004, Legal Notice No. 42 of 1<sup>st</sup> May 2005, Legal Notice No. 70 of 1<sup>st</sup> May 2009, Legal Notice No. 98 of 1<sup>st</sup> May 2010, Legal Notice 64 of 1<sup>st</sup> May 2011, Legal Notice No. 71 of 1<sup>st</sup> May 2012, Legal Notice No. 197 of 1<sup>st</sup> May 2013, Legal Notice No. 117 of 1<sup>st</sup> May 2017, Legal Notice No. 112 of 1<sup>st</sup> May 2017 and Legal Notice No. 2 of 1<sup>st</sup> May 2018.
8. In Kathra Hussein Noor & Another V Kaderdina Hajee Essak Limited (2016) eKLR cited the case of David Wanjau Muhoro V Ol Pajeta Ranching Limited (2014) eKLR where the court observed that when an employee's salary remains unpaid or underpaid, the recovery of these amounts is not restricted by the limitation in Section 90 of the *Employment Act*. All accrued benefits must be paid upon termination. Since arrears and underpayments represent a continuing default by the employer, time for claims begins only once this default ceases. Each month, the default continues, and the accrual time resets, allowing claims for unpaid salary, discrimination, and underpayments to be made for the entire employment period, as long as the overall claim is not time-barred.



9. The Appellant submitted that the Respondent did not produce any muster roll or tangible records to disprove the claim for overtime and relied on Section 107 of the *Evidence Act*, which provides as follows:
- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
10. The Appellant urged this Honourable Court to award the overtime dues, which were calculated and amounted to Kshs. 330,743.90/= and relied on *Kathra Hussein Noor & Another V Kaderdina Hajee Essak Limited (supra)* in support of that proposition.
11. The Appellant submitted that the Respondent did not file a cross-appeal regarding the counterclaim for defamation. The Appellant also submitted that to decide if a statement is defamatory, the court should consider what an ordinary reasonable man would understand the words to mean. If the meaning is determined, the test is whether a reasonable person would interpret the published words as defamatory under the given circumstances. The Appellant submitted that the Respondent did not establish in what way or manner the institution was slandered; hence, the general damages for slander must fail.
12. The Appellant submitted that he is entitled to costs and relied on *Republic V Rosemary Wairimu Munene, Ex-parte Applicant V Ihururu Dairy Farmers Cooperative Society Ltd.* It was held as follows:
- “The issue of costs is the discretion of the court. The basic rule on attribution of costs is that costs follow the event. It is a well-recognized principle that when costs follow the event it is for purposes of compensation the successful party for the trouble taken in prosecuting or defending the case.”
13. The Appellant urged this Honourable Court to allow the appeal as prayed with costs.

### **Respondent’s written submissions**

14. The Respondent submitted that the Appellant did not prove he was unfairly terminated. The Respondent also submitted that the Appellant did not provide a protest letter, a demand letter, or a notice of intention to sue to support his claim. The Respondent relied on Sections 41 and 47(5) of the *Employment Act* together with the case of *Ann Wanjiku Mwangi V Faith Homes of Kenya [2021] eKLR* where the court stated that the claimant, who alleged forced resignation amounting to termination, failed to prove that her employment was terminated by the respondent as required under section 47(5) of the *Employment Act*. The burden was on the claimant to prove termination and its unfairness or wrongfulness, which was not achieved as there was no evidence, like a termination letter. Consequently, the claimant did not meet the legal requirement to prove unfair termination.
15. The Respondent submitted that it accommodated the Appellant’s drunkenness by seeking counselling and psychosocial support and even employed a substitute teacher to step in while he underwent counselling. The Respondent submitted that the Appellant is not entitled to 12 months’ gross salary as compensation sought and thus argued that 1 month’s gross salary would be sufficient compensation.
16. The Respondent submitted that the Appellant resigned and was not terminated. However, the Appellant did not complain that he was terminated when he collected his recommendation letter,



- and the learned magistrate held that the Appellant failed to prove his unfair termination, notice pay and compensation for unfair termination did not rise. The Respondent relied on Section 10(7) of the [Employment Act](#), where the burden of proving or disproving terms of employment is on the employer.
17. The Respondent submitted that the Appellant alleged to be a teacher instead of a general clerk; thus, he was not underpaid. The Respondent relied on *Richard Owino Odera V Star of the Sea High & Another* [2018] eKLR; the court stated that the Claimant's request for underpayment of salary was declined because he did not provide any legal basis or evidence to support his claim. He had agreed on a salary with the Board of Management, which was based on his employment contract. He presented a document on the minimum teachers' gross salary for 2015/2016 but failed to explain how it applied to his contract or provide related circulars from the Salaries and Remuneration Commission and TSC. Thus, the court found no reason to grant his claim for underpayment.
  18. The Respondent submitted that the Appellant was employed on a part-time basis and alleged to have worked 10 hours per day from Monday to Friday, making a total of 50 hours per week, thus below 52 hours per 6-day limit, and he is not entitled to overtime. The Respondent relied on the case of *Valentine Ataka V Karatine University* [2019] eKLR; the court held that the Claimant was engaged as a part-time worker, as recognized by international conventions and the [Employment Act](#). The Respondent's lecturing method fit the concept of "piece work." The Claimant's part-time status is supported by his contracts of engagement. He is entitled to be paid for the work done but could not show he was owed more than Kshs. 195,000/=, which the Respondent agrees to pay. The Respondent will pay the sum due, and since the Claimant had to seek the Court's intervention, he is also entitled to costs. The Respondent acknowledges paying Kshs.218,400/=and owes an additional Kshs.195,000/= as gross.
  19. The Respondent submitted that the claims for underpayment and overtime were time-barred and relied on the case of *Charles Kariuki Mwangi V Intersecurity Service Limited* [2018] eKLR the court stated that under the [Employment Act](#), the claims are limited to 3 years; therefore, the claims were statute-barred and unrecoverable.
  20. The Respondent submitted that the Appellant was not entitled to the reliefs as stipulated in Section 49 of the [Employment Act](#) in particular notice pay since he had resigned; therefore, there was no unfair termination. The Respondent is entitled to one month's notice pay. Section 49(4) of the [Employment Act](#) deals with compensation for unfair termination.
  21. The Respondent submitted that if this Honourable Court finds that the Appellant is entitled to underpayment and notice pay, the Appellant should be awarded Kshs.58,540/= for underpayment and Kshs.11,536/= as notice pay since he was a general labourer.
  22. On the counterclaim, the Respondent submitted that being a respectable member of society and a seasoned minister suffered slander, losing his reputation. The Respondent should be paid compensation of Kshs.1,000,000 as general damages for defamation and relied on the case of *Mong'are t/a Gekong'a & Momanyi Advocates V Standard Ltd* [2002] the court cited the case of Civil Application No. NAI 131 of 2004(NAK. 8/04), the Court of Appeal awarded Kshs.2,600,000/=.
  23. The Respondent submitted that the Appellant does not deserve costs and prays that the appeal be dismissed with costs.

### **Analysis and determination**

24. Having considered the record of appeal and the submissions by both parties, the issue for determination is whether the appeal before this Honourable Court is merited.



25. As the first appellate court, it will review the evidence anew, re-evaluate it, and draw conclusions while considering that it did not have the opportunity to hear the witnesses testify and apply the law appropriately. In *Peters V Sunday Post Limited* [1958] EA 424, the Court of Appeal held as follows:
- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
26. On 28<sup>th</sup> September 2023, the trial court delivered its judgment and held that the Respondent resigned from the Appellant’s employment because he found a better opportunity elsewhere. He was provided with a recommendation letter, and stated that he was not terminated, as he did not file a complaint with the Labor office and was found not to have been unfairly dismissed. The trial court further held that he was not entitled to notice pay, compensation for unfair termination, underpayment and overtime. For the counterclaim, the trial court stated the Appellant failed to prove defamation on a balance of probabilities and the same was dismissed.
27. Upon perusing the record of appeal, this Honourable Court does not agree with the trial court that the Respondent resigned from the Appellant’s employment as per the recommendation availed during the hearing. The Respondent was regarded as a general worker, but in a real sense, he was a computer teacher with over 10 years of experience working for the Appellant, according to the recommendation letter dated 9<sup>th</sup> January 2020. The recommendation letter described the Appellant as dedicated, faithful, committed, and hardworking.
28. The purpose of a recommendation letter is to endorse an employee’s skills and qualifications, while a resignation letter is a formal notice from an employee indicating their intention to leave their job. From the look of things, the Appellant did not resign from his employment.
29. Section 47(5) of the *Employment Act* provides as follows:
- “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.”
30. In *Pius Machafu Isindu V Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated as follows:
- “So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under Section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”



31. The Respondent informs the court that the Appellant resigned voluntarily from his employment. The two parties did not produce any documents to demonstrate the employment terms or the position the appellant held at the organisation. They also did not produce the letter purported to have been issued by the appellant for resignation.
32. The Appellant just claims he was orally terminated from his employment. What is on record is only a letter by the Respondent confirming that the Appellant was then computer teacher for a period of over ten (10) years.
- They affirmed that he was a committed, dedicated, faithful, and hardworking employee.
33. In the absence of any evidence it is not clear how the appellant was terminated as it is the word of the Appellant against the word of the Respondent.
34. The court cannot be expected to just make presumptions and in this case the trial court just made a presumption that the appellant resigned from his employment. The court will just note that the appellant left his employment under some unclear circumstances.
35. The trial court stated that since the Appellant was handed the recommendation letter and did not raise any complaint then he left employment voluntarily.
- That is a presumption and this court holds the trial court made an error in assuming the Appellant resigned from his employment and yet there is no evidence to support that allegation.
36. As to compensation, the court will award the Appellant what the Respondent conceded were willing to pay in their submissions dated 11<sup>th</sup> December 2024.
37. For the counterclaim, this Honourable Court will uphold the decision of the trial court. There is no evidence to support a claim for Defamation against the Respondent so the holding of the trial court is upheld.
38. Flowing from the foregoing, this Honourable Court finds that there is no clarity on the appellant's termination but nevertheless awards his well owed dues as follows: -
1. Total Underpayment - Kshs.58,540/=
  2. Notice pay - Kshs.11,536/=.
  3. Compensation for unfair termination is declined as there is no evidence as already said to support unfair or unprocedural termination. It is just not clear under which circumstances the appellant left his employment.
  4. Overtime is also not proved as the Appellant Presented no evidence of having worked overtime without any compensation. The court is persuaded by the Case of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] KEELRC 1607 (KLR), where the court stated that employers are responsible for maintaining employment records, and employees must prove their claims for overtime pay. The court held that the claim for overtime was not proven on the balance of probability. Since the same has not been proved, the court will decline to award.
39. As for the costs each party will pay their respective costs both of the lower court and of this court.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7<sup>TH</sup> DAY OF MARCH, 2025.**



**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

