Achola v Kigen (Chairman Moses Wambugu & Albert Mavutha, Residents' Association Being Sued on their Own Behalf and on Behalf of Pioneer Phase II Estate) (Employment and Labour Relations Appeal E340 of 2024) [2025] KEELRC 1515 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1515 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E340 OF 2024

JW KELI, J

MAY 23, 2025

BETWEEN

PETER ACHOLA ..... APPELLANT

AND

MAJOR J KIGEN ..... RESPONDENT

CHAIRMAN MOSES WAMBUGU & ALBERT MAVUTHA, RESIDENTS' ASSOCIATION BEING SUED ON THEIR OWN BEHALF AND ON BEHALF OF PIONEER PHASE II ESTATE

(Being an Appeal from the Judgment and Orders of the Honourable H. M. Ng'ang'a (PM) delivered at Nairobi on the 16th of March, 2023 in MCELRC No. 2333 of 2019)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable H. M. Ng'ang'a (PM) delivered at Nairobi on the 16th of March, 2023 in MCELRC No. 2333 of 2019 between the parties filed memorandum of appeal dated the 28th day of November,2024 seeking the following orders:-

    a. The appeal herein be and is hereby allowed.

    b. The judgment of the trial court delivered on 16th March, 2023 in CMEL NO. 2333 OF 2019 be set aside.

    c. The Honourable Court be pleased to award the Appellant the terminal dues and compensation as prayed in the Appellant's statement of claim filed in the lower court amounting to Kshs. 2,543,977.99 or such amount as the Honourable Court may deem fit and just.

d. The costs of the Appeal and the lower court be awarded to the Appellant.

e. The Honourable Court do issue such orders and reliefs as it may deem fit and just to grant.

Grounds of the Appeal

2. The Honourable Magistrate erred in law and in fact by dismissing the entire claim by the Appellant with costs to the Respondent against the weighty evidence on record and the law applicable in respect to employees' terminal benefits.

3. The Honourable Magistrate erred in law and in fact by failing to award the Appellant one month's salary in lieu of notice.

4. The Honourable Magistrate erred in law and in fact by failing to award the Appellant house allowance as required by the mandatory provisions of Section 31 of the *Employment Act* 2007.

5. The Honourable Magistrate erred in law and in fact by failing to award the Appellant his claim for leave days for the years worked as required by the provisions of Section 28 of the *Employment Act* 2007.

6. The Honourable Magistrate erred in law and in fact by failing to award the Appellant service gratuity as required by the provision of Section 35 of the *Employment Act* 2007 in the absence of evidence of his membership of the national social security fund (NSSF) or any other retirement benefit scheme and also in compliance with rule 17 of the Regulation of Wages (Protective Security Services) Order, 1998.

7. The Honourable Magistrate erred in law and in fact by failing to award the Appellant his claim for overtime despite there being no evidence of such payments.

8. The Honourable Magistrate erred in law and in fact by failing to award the Appellant unpaid public holidays that he worked.

9. The Honourable Magistrate erred in law and in fact by failing to award the Appellant his claim for underpayments despite the fact that the Appellant was underpaid during the course of his employment since he was earning a paltry Kshs. 7,000/- only which was way below the minimum wage order.

10. The Honourable Magistrate erred in law and in fact in failing to make a finding that the termination of the Appellant was unlawful and unfair.

11. The Honourable Magistrate erred in law and in fact by not considering the facts, evidence and submissions made by the Appellant.

12. The Honourable Magistrate erred in law and in fact by failing to consider and have due regard to the Appellant's case and to the facts and evidence presented in support thereof.

13. The Honourable Magistrate erred in law and in fact in dismissing the Appellant's claim with costs to the Respondent.

Background to the Appeal

14. The Appellant filed a claim against the Respondent vide a statement of claim dated 4th December 2019 seeking the following orders:-

i. A declaration that the Claimant's termination from his employment was unfair and unlawful.

ii. The Claimant be paid his full terminal benefits as set out in paragraph *13* hereinabove amounting to Kshs. 2,543,977.99.

iii. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

iv. The Respondent to pay the costs of this claim.

v. The Respondent be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the *Employment Act*, 2007.

vi. Interest on the above at Court rates.

(Pages 8-11 of the ROA dated the 2nd of December 2024)

15. The Appellant filed his verifying affidavit, his list of witnesses, his witness statement and list of documents all dated the 4th of December 2019 (see pages 12-16 of ROA).

16. The claim was opposed by the Respondents who entered appearance and filed a response to the statement of claim (pages 19-20 of ROA); a Notice of Preliminary Objection (page 21 of ROA); Witness statement of Albert Mavutta dated the 13th of May 2022 (pages 24-25 of ROA); Witness Statement of Joyce Warue Kimani dated 14th July 2022 (page 32-33 of ROA); and produced as its documents employment records attached to their List of Documents dated the 13th of May 2022 (pages 26-31 of ROA) and Supplementary List of Documents dated the 14th day of July 2022 (pages 34-37 ROA).

17. The Claimant/Appellant's case was heard on the 13th of October 2022 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent Ms. Githinji (pages 67-70 of ROA).

18. The Respondent's case was heard on 24th November 2022 where RW1 was Albert Njue Mavutha who relied on his filed witness statement and produced the Appellant's documents. He was cross-examined by counsel for the Appellant Mr. Nyabena (pages 71-74 of ROA). RW2, Joyce Kimani, testified on the same date, and similarly relied on her filed witness statement and was cross-examined by counsel for the Appellant Mr. Nyabena (pages 74-75 of ROA).

19. The parties took directions on filing of written submissions after the hearing. The parties complied.

20. The Trial Magistrate Court delivered its judgment on the 16th of March 2023 dismissing the Claimant/Appellant's case with costs to the Respondents (Judgment at pages 154-158 of ROA).

Determination

21. The appeal was canvassed by way of written submissions. Both parties filed.

22. 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."

23. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed 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

24. The appellant condensed the grounds of appeal into 3 issues:-

    a. The trial court erred in fact and law in making a finding that the appellant's termination was fair and lawful.

    b. the trial court erred in fact and law by failing to award the appellant the reliefs sought or give some reasons or analyse and make finding on each of the reliefs sought

    c. who should pay the costs of the appeal and the trial court

25. The Respondent submitted on the grounds of the appeal.

26. The court on perusal of the memorandum of appeal and submissions of the parties was of the considered opinion that the issues placed before the court for determination in the appeal were:-

    i. Whether the appellant's employment was terminated and if so if it was fair

    ii. Whether the appellant was entitled to reliefs sought

Whether the appellant's employment was terminated and if so if it was fair

Appellant's submission

27. Termination or absconding from duty: - The trial court in determining the suit proceeded on wrong principles and fell into error from the time of framing the issues for determination before it. The trial court erroneously framed the issues for determination at page 57 of the record as follows:

    (a) "Was the dismissal of the Claimant by the Respondent unfair, wrongful and unlawful.

    (b) lf (a) above is in the affirmative is the Claimant entitled to the relief sought?

    (c) Costs.

    Whereas issue (a) and (c) above were properly framed by the trial court, issue number (b) with due respect to the Honourable Magistrate was clearly a mis-direction. The Honourable Court proceeded on wrong principles and therefore fell into an error and as such led to miscarriage of justice. The trial Court had a duty to make a finding on one way or another on the remedies and/or Court's reliefs sought by the Appellant. Those reliefs did not depend on the finding on whether the termination of the Appellant's employment was lawful or not. The finding of the trial Magistrate albeit wrongly that the termination was lawful would only affect the prayer for compensation of twelve (12) months. The other remedies the Appellant sought would still be considered and granted depending on the evidence tendered and the law applicable. The finding of the trial Magistrate on the Appellant's termination is also contradictory and difficult to decipher. The trial Court further proceeds to address its mind on a matter which was not raised by the parties through their pleadings or the evidence tendered in Court. The trial Court at paragraph 18 of the judgment addresses the issue of constructive dismissal and in paragraph 19 of the said judgment which is on page 58 of the record, the trial Court out of the

blues makes a finding that:- "On a balance of probabilities I find that the Claimant was not unfairly dismissed." If anything he was invited to a meeting to explain whether he was working elsewhere. Failure to attend the meeting without reason and failure to resume his duties afterwards places the blame squarely on him." At Honourable paragraph *24* in yet another contradiction in the judgment, the Court held that: - "This Court finds and holds that the Claimant deserted from employment and his termination, if any, was fair and lawful.

28. The appellant submitted that it is not clear from the above conclusions and holding of the whether the Appellant was constructively dismissed, absconded from duty or was terminated lawfully or otherwise. The issue of constructive dismissal was not raised by any of the parties and to tell how the Honourable Magistrate brought out the issue when neither the Appellant nor the Respondent raised the issue in their evidence, pleadings and submissions. The term constructive dismissal also known as constructive discharge occurs when an employee resigns not because they want to but the employer's conduct and action necessitates it. The facts and evidenced submitted before the trial Court demonstrates beyond any peradventure that there was no constructive dismissal. The Appellant did not resign from his employment but was simply terminated from his employment through a phone call by one Kigen the Chairman of the Pioneer Phase Il Estate. There was no resignation authored by the Appellant bringing his employment contact to an end. Unfair and unlawful termination or absconding from duty. The Claimant in his pleadings and witness statement and the evidence tendered before the trial Court stated that he was unfairly and unlawfully terminated from his employment by one Major Kigen the Chairman of the Pioneer Phase II Estate on 31st July, 2019. The said Major Kigen though being a party in this suit did not testify and refute the Appellant's version. The evidence of the Appellant therefore on this score is largely unchallenged. The Appellant was not issued with a notice to show cause to enable him know in advance the reasons which the Respondent or any of the officers or residents had against him to enable him respond as appropriate. He was never called for a disciplinary meeting and his charges disclosed to him and asked to be accompanied by a fellow employee as mandatorily required by the provisions of Section 41 of the *Employment Act*, 2007. The trial court made some findings which are not supported by the proceedings and the court record and therefore misapprehended the facts and the law applicable. At paragraph 17 of the judgment the trial court stated that:- "The two parties have given diametrically opposed versions on how the employment relationship between them ended on the one hand the Claimant alleges that his employer left him in untenable position and he opted to leave employment..." Going through the Claimant's witness statement which is on page 14 of the record and also the proceedings of the Lower Court which captured the Claimant's evidence before the Lower Court which are on pages 67-70 of the record, there is nowhere the Claimant has stated that he deserted duty of absconded from his employment. The Court also made an erroneously finding that the Appellant absconded from duty perhaps relying on photographs which the Respondent submitted to Court which were taken in 2021 and/or 2022 long after the Appellant had been terminated by the Respondent. At page 33 of the record of appeal, Albert Mavutha the Respondent's witness stated:- "1. On various dated in February 2022, I took two photographs attached herewith in the list of documents my cell phone, a Tecno8 Model No. Tecno KG7L." Of what probative will photographs taken three (3) years after the Claimant's termination? The above question was put to the said witness by the defence during cross-examination at page 73 of the record and he stated that following and confirming the apparent contradictions in the Respondent's case:- "The date the photos were taken is February 2021 not February 2022. Photos were taken when he was still working. I took the photo in the period indicated." The foregoing evidence corroborates the Appellant's evidence at page 69 of the record last paragraph where the Claimant stated:- "The photos in court don't show when they were taken. They took photos when I had left the work. I was working in the neighbouring Court." This proves beyond any reasonable doubt that the photos were taken after the termination date (31/7/2019).

29. Section 43 of the *Employment Act*, 2007 provides as follows: "(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. (2)The reason or reasons for termination of employment of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee". It was the Claimant's evidence that he reported to work as usual until on 31st July, 2019 when the Respondent unfairly and unlawfully terminated his employment through a telephone call by one Major Kigen the Chairman without any justifiable reason. It was also the Claimant's testimony that he was not issued with any letter of show cause spelling out the reasons as to why his services were being terminated as is required under Section 41 of the *Employment Act*, 2007. The Respondent in its statement of defence alleged that the Claimant had deserted duty and thus was not available for a hearing. The said allegation was not substantiated. The law regarding desertion requires the party alleging desertion to table evidence employee demonstrating the steps shown to reach the said employee and that he had demonstrated every intention not to return to work as was held in the locus classicus case of SABC v CCMA and Others (2002) 8 BLLR 693 (LAC) Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process. In the present case, the Respondent has not filed the attendance register for July, 2019 to challenge the Claimant's evidence that he worked normally but upon reporting to work on 31st July, 2019 he was given a call by Major Kigen, the Chairman of the Respondent's company asking him not to report to work. A hearing must be conducted even when contemplating termination of an employee deemed a deserter and for the record the claimant maintains that he did not desert duty. The court in Milano Electronics Limited v Dickson Nyasi Muhaso [2021]eKLR considered the issue of desertion and the circumstances under which the same can lead to a fair termination of employment. The court held; "The Appellant was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure". The trial magistrate in my view rightly relied on the case of Godfrey Anjere v Unique Suppliers Limited [2015] eKLR where the court said that in cases where an employee is alleged to have deserted duty, it was necessary for the employer to show that it had taken steps to indicate to him that his employment could be terminated for unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as a basis of justifying the separation. The court expressed itself in the following way on the issue:- "a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time" The law clear that even if an employee absconds from duty, the employer has to contact the employee to resume duty and if not then the employer has a right to initiate disciplinary proceedings in terms of Section 41 of the *Employment Act*, 2007. In the case of Richard Kiplimo Koech vs at Yako Supermarket ELRC Cause No. 119/2014; [2015] eKLR, Hon. Radido J. page 4 line 47 held that: - "Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the *Employment Act*, 2007, a hearing is necessary." In the case of Joseph Nzioka vs Smart Coatings Limited; ELRC Cause No.89%/2014; [2017] eKLR Honourable Abuodha J. at paragraph 10 of the said judgment held that: - "Dismissal on account of absconding must be preceded by evidence showing that reasonable attempts were made to contact the employee concerned and that a show cause letter was issued to such services employee calling upon such employee to show cause why his should not be terminated on account of absconding duties. A similar holding as above was made by Hon. Agnes Nzei J. in ELRC Cause NO. 267/2018 (Mombasa) [2022] eKLR. The trial Court erred in law and fact in believing the Respondent's evidence in view

of the fact that there was material contradiction in the evidence submitted by the Appellant on the reasons for the termination of the Respondent from his employment. The Appellant in its statement of response dated 28th February, 2022 avers that the "Appellant (Claimant) deserted duty from his employment with the Pioneer Phase II Estate Resident Association in July 2019. The Respondent further avers that at that point the Claimant (Appellant) had taken up another employment offer at Kariobangi South 2nd Avenue.it is clear that no attempts were to trace the claimant. Furthermore, the Respondent did not give any justifiable reasons as to what prevented it issuing a notice to show cause and conduct a hearing before terminating the Claimant's employment as required by the mandatory provisions of Section 41 of the *Employment Act*, 2007. Evidence on record show that the Respondent was not accorded the right to respond to the accusations against him. The Respondent did not send any letter, message, SMS, Whatsapp or email to the Appellant asking him to respond to specific charges before the unfair and unlawful.

The Respondent's submisions

30. The instant Appeal was commenced vide a Memorandum of Appeal dated 28th November 2024 listing 12 grounds thereof. Grounds 2 & 9: These twin ground concern themselves with the question of whether the termination of the Appellant was unfair. For the process of termination to be deemed fair, and employer must prove both substantive and procedural fairness. The twin issue was considered by the Court of Appeal in Nairobi Civil Appeal No. 15 of 2014 Naima Khamis v Oxford University Press (E.A) Ltd [2017] eKLR On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2) (c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required. The burden of proving unfair termination is in the first instance upon the Employee and thereafter the burden of disproving the same is upon the Employer. In the same case the Court said On a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer (section 47(5) of the Act) The Appellants account was that he was called by the 1st Respondent who informed him that he had been terminated. RW1 while agreed indeed that the call was made, however denied that the call was to communicate termination. RW1 gave evidence to the effect that there had arisen complaints about the Claimant from his direct reports that there was lack of coordination and management directions , and that the Claimant would be asleep most of the day, and generally used his position as supervisor to shield himself from his responsibility. Investigations had revealed that the Appellant had taken up another job elsewhere.

31. RW1 provided photographic evidence of the Appellant at his alternative place of work, being Kariobangi South 2nd Avenue, as a guard. His place of employment subject of these proceedings was Pioneer Estate Phase II. The evidence was corroborated by RW2, one Joyce Warue Kimani, Who is the one who spotted the Appellant at his duty post at Kariobangi South 2nd Avenue and informed RW1, the third Respondent. According to RW1, a meeting was convened by the 3 Respondents whereupon it was agreed that the Appellant be summoned to explain why he had taken on another employment which was wrong. The evidence is to be found at Page 72 & 73 of the Record of Appeal. It would appear that the Appellant was not willing to explain the situation and construed the summons as dismissal.

The position at law is that the duty upon the Respondent is to provide an opportunity for the employee for a hearing. An employee who elects not to participate thereafter cannot turn around and plead unfair termination. We reiterate the authority of Nakuru Employment & Labour Relations Cause No. 58 of 2019 Peter Njuguna Chege v Timsales Limited (2020) e KLR as cited before the trial Court for its authority. The Court of Appeal also considered this question in Nairobi Court of Appeal Civil Appeal No. 129 of 2019 Ngunda v Ready Consultancy Limited [2022] KECA 577 (KLR) (4 February 2022) (Judgment) 'An analysis of the facts as they transpired show that the appellant was issued with two show cause letters. He declined to receive the first one. He was provided with ample opportunity to respond. He was invited to attend a disciplinary hearing. He attended and asked for more time to have one of his colleagues accompany him to the hearing, stating that he would return by 5 pm. He was granted more time. It is instructive that he went away never to return. The appellant was given an opportunity to be heard. He chose not to appear before the disciplinary hearing, as a consequence of which, he has no one else but himself to blame for having squandered that opportunity. As such, we agree with the trial judge that the procedure adopted by respondent was procedurally proper, and we so find. We have also shown that the Respondent had various issues to sort out with the Appellant including irregularly procuring alternative employment and failure in management and coordination. Hence there would be sufficient grounds to prove substantive fairness. In the circumstances of the case we humbly submit that the Appellant cannot be heard to plead unfair termination. Having said that, in our view, the issue of lawful termination does not even arise. When the Appellant was called for a meeting to discuss the issues, he took off, never to return. Filed on: 2025-03-12 14:10:29+03 - BY: D. K. Githinji & Company - Reference: E4DFL9D8 - KSH. 75.00 He was not fired. He deserted, probably as a victim of his own conscience, and rightly so. We reiterate the authority of Mombasa Employment & Labour Relations Court Cause No. 339 of 2016 Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR cited before the trial Court. The Appellant had deserted duty, and when he was called upon to explain why, he went away for good and resorted to Court. He cannot blame the Respondent. 11. In the first place, desertion is gross misconduct warranting summary dismissal under Section 44 of the *Employment Act*. We are here guided by Nairobi Employment & Labour Relations Court Cause 2473 of 2017 Wangereka v Rupra [2023] KEELRC 625 (KLR) (16 March 2023) (Judgment) Gross misconduct is deemed to happen when, inter alia, an employee absents himself from duty without lawful cause and without the permission of the employer. Whilst mere absenteeism from work may not of itself constitute desertion, an employee who leaves employment without permission of the employer and with no intention of returning is considered as having deserted. Such employee is considered as having committed an act of gross misconduct under section 44 of the *Employment Act*. Paragraph *22* 12. An employer is however enjoined to provide an opportunity to the deserting employee to be heard. The Court went ahead and said As was observed inLuka Mbuvi v Economic Industries Limited [2020] eKLR, the employer must demonstrate the effort made in ensuring compliance with the requirements of section 41 (2) of the *Employment Act*. Given that the law entitles such employee the right to be heard before closure of the employment relation, the employer ought to demonstrate that he has made effort to find out where the employee is and required him to account for his absence from work. The court in the Luka Mbuvi case had this to say on the issue:- ''In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party .....Under the statutory framework in our jurisdiction, a deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through colleagues or contact details in the employee's file (records)..... An employer can also issue an ultimatum such as through a show-cause letter addressed to the employee's contact details on its records.''

32. Relatedly, in Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd (2020) eKLR the court stated as follows; "Further, even if she had absconded, she is by law entitled to a fair disciplinary process

as set out in section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to termination . . .” This is what the Respondent did, and the Appellant rebuffed it with abandon. He is the author of his own misfortune, and Grounds 2 & 9 must fail.

Decision

33. The court on re-evaluation of the evidence before the lower court , the court agreed with the trial court that the claimant having been summoned for the meeting failed to appear and thus absconded duty. The court was also persuaded by evidence of the respondent that the appellant had secured employment with neighbouring residence during the employment and perhaps that is why he evaded the meeting. The court was not persuaded that the said Kigen called the appellant not to attend the scheduled meeting.

34. The employer nevertheless ought to have issued notice of termination to the claimant to end the relationship under section 41 of the *Employment Act* as held 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 court finds that for lack of compliance with section 41 of *Employment Act* end the employment relations, the appellant was entitled to notice pay which is awarded as sought for Kshs. 12926. The court cannot award an employee for own misconduct of absconding and working elsewhere, The trial erred for failing to award notice pay.

Whether the claimant was entitled to reliefs sought

35. The trial court did not consider the reliefs sought which I find was in err. The appellant sought the following reliefs before the lower court:-

    i. A declaration that the Claimant’s termination from his employment was unfair and unlawful.

    ii. The Claimant be paid his full terminal benefits as set out in paragraph 13 hereinabove amounting to Kshs. 2,543,977.99.

    iii. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

    iv. The Respondent to pay the costs of this claim.

    v. The Respondent be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the *Employment Act*, 2007.

    vi. Interest on the above at Court rates.

    (Pages 8-11 of the ROA dated the 2nd of December 2024)

Appellant’s submission

36. The trial Court was under an obligation to address its mind on the various reliefs sought by the Appellant. Even where an employee's termination was found to be fair and lawful, the Court may award remedies like salary arrears, leave pay, service/gratuity, overtime, have underpayments, house allowance or public holidays. The Appellant should not have been denied these reliefs by the trial Court when the evidence on record suggested that he was entitled to the same. This Honourable Court (Abuodha J) in the case of Mary Mwende Muema vs Beatrice Wairimu Kariuki T/A Beatrice

Kariuki & Co. Advocates; ELRCA NO. E124 OF 2022, held that the Appellant was entitled to analyse the reliefs entitled as prayed in the statement of claim. The Court in pertinent part stated:- "1. This therefore means that even if the Appellant was guilty of gross misconduct leading to summary dismissal she still had to be taken through the disciplinary process. It is clear before the court that the Appellant was never given any show cause letter, any hearing or notice and she denied even receiving any dismissal letter as alleged by the Respondent who could not demonstrate if the same was received by the Appellant. 2. The Respondent violated the clear provisions of section 41 of the Act. this of Commercial respect, the court is guided by the holding in the case of Kenya Union Food and Allied Workers vs Meru North Farmers Sacco Limited [2014] eKLR that: - In Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.1. In conclusion the Appellant's termination was both substantively and procedurally illegal, unfair and unjustified and the trial Court erred on its finding that the Appellant did not prove her case on balance of probability and hence this Court overturns its finding. Whether the trial court erred by fining that the Appellant was not entitled to the reliefs sought. 1. This court having found that the Appellant was unfairly dismissed from employment proceeds to analyse the reliefs entitled to the Appellant as prayed in her claim." It is the Appellant's submission that despite being entitled to terminal dues at the point of his termination, the same was not paid by the Respondent at all. The Appellant therefore prays that this Honourable Court awards him his terminal dues as particularized hereunder.

37. This Honourable Court (Keli J) discussed at length on what constitutes procedural and substantive fairness in the case of Joash Ambogo Ongweso vs Green Pastures Farm [2024] KEELRC 1687 (KLR). At paragraph 30 of the said judgment the Court held as follows after quoting in .....the provisions of Section 41 of the *Employment Act*, 2007." The Court holds that the letter dated 23rd May 2022 was not compliant with the mandatory provisions of Section 41 of the *Employment Act* as there is no evidence that the Claimant was ever invited to a hearing in the presence of another employee or a shop floor union representative of his choice. There was no hearing or evidence of opportunity to be heard as found by the Learned Magistrate.The above finding of this Honourable Court is all fours with this appeal.

38. On claim for One-month's salary in lieu of notice- Section 35 of the Employment obligates any party intending to terminate a contract of service to issue the adverse party a one month of such intention to terminate service. In the present case it is the Appellant's evidence that no such notice was issued to him. The Appellant stated in his testimony that he reported to work as usual until on 31st July, 2019 when he was given a call by Major Kigen the Chairman of the Respondent's company asking him not to report to work without any prior notice of such intention. The Appellant therefore prays that this Honourable Court would award him his prayer of Kshs. 12,926.55/= being salary in lieu of notice. This is the salary the Respondent was entitled to in his capacity as a watchman under the General Wages Order applicable at the time of termination in 2019.

39. Annual leave -Section 28 of the *Employment Act*, 2007 entitles every employee to a minimum of 21 days leave in every 12 consecutive months of working. The Appellant herein testified that by the time of his termination, he had not gone for his annual leave during the whole period of his employment with the Respondent and the same was not compensated for by the Respondent. Despite the Respondent alleging in its defence that the Claimant used to go for annual leave, it failed to table any evidence to support the assertion despite Section 74 of the *Employment Act*, 2007 placing the onus of keeping employment records on the employer. There were no leave forms submitted by the Respondent before the trial Court to show and demonstrate that the Appellant was granted leave. The Appellant therefore humbly prays for an award of Kshs. 83,525.40/= being annual leave for the year 2020.

40. House allowance - Section 31(1) of the *Employment Act* as read with the rule 5 of the General Wages protective security wages order provides that every employee is entitled to accommodation at the Employer's expense or house allowance of 15% of the basic salary if accommodation is not provided for by the Employer. It was the Appellant's testimony that he was neither issued with accommodation by the Respondent nor paid in lieu thereof in contravention of the law. The Respondent's witness in his testimony alleged that the prayer for a house allowance is a claim in the nature of continuing injury and is time barred as a function of the law. Despite Section 20 of the *Employment Act* 2007 placing an obligation upon the employer to issue an itemized pay statement to every employee, the Respondent herein violated this requirement for a whole 8 years. Therefore, since no pay statement was ever issued to the Appellant indicating the particularization of his salary, we pray that this Honourable Court finds that the same was not paid to the Appellant for the whole period of his employment. The Appellant therefore humbly prays for an award of Kshs. 178,386.39/= being accrued house allowance for the 8 years that he was in employment.

41. Service pay / Gratuity -, Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998 provides that every security guard shall be entitled to service gratuity at the rates of 18 days for every complete year worked. It was the Claimant's testimony that he has been in the Respondent's employment since 2012 making it a total of 8 complete years. This evidence was confirmed and corroborated by Albert Mavutha, the Respondent's witness. We therefore pray that this Honourable court awards the Appellant Kshs. 71,593.20/= being service pay as prayed in the Statement of Claim.

42. Overtime , Regulation 6 and 7 of the Regulation of Wages (Protective Security Services) Order, 1998 as read together with Section 9 of the *Employment Act*, 2007 entitles every security guard who works for more than 52 hours a week payment of overtime. It was the Appellant's testimony that he used to report to work at 6:00pm and leave at 6:00am working four hours overtime daily without any overtime compensation. The Appellant therefore prays for payment of Kshs. 543,784.80/= being overtime compensation. The Claimant's evidence was corroborated by Albert Mavutha, the Respondent's witness who at page 73 of the record which he was recorded as stating that: - "However he worked at 6am to 6pm. They had to have 2 days off every week. They used to have a schedule....."

43. Public holidays -It was the Appellant's testimony that for the whole period of his employment he worked during public holidays without any payment in compensation. The Appellant worked for a total of 11 public holidays yearly including Mashujaa day, Madaraka day, Easter Monday, Good Friday, Christmas day, Jamhuri day, compensation. Boxing Day, Labour day, Utamaduni day (formerly Moi day), Idul Fitri without any The Appellant therefore prays for compensation for the public holidays worked for the whole period of his employment amounting to Kshs. 49,760/=.

44. 12 months' compensation for unfair termination - Section 49 of the *Employment Act* provides that where an employee has been unlawfully terminated, the employee shall be entitled upto 12 months' compensation for unfair and unlawful termination. Having therefore demonstrated that the Appellant was terminated unfairly as the Respondent failed to observe both substantive and procedural fairness the Appellant prays thus, that this Honourable Court awards him 12 months' compensation of Kshs. 155,118.60/= for the unlawful and unfair termination.

45. Underpayments - it is the Appellant's submission that for the years 2012 - 2019 his salary did not conform to the minimum wage stipulations as provided under the general wages order and as particularized at paragraph 13(vii) of the Statement of claim. The Appellant therefore prays for his accrued underpayments amounting to Kshs. 462,523.85/= as claimed in his statement of claim which is on pages 8-11 of the5/= as claimed in his statement of claim which is on pages 8-11 of the Record of Appeal. Rule 3(1) of the Regulation of Wages (Protective Security Services) Order 1998 provides

as follows: - "No person to who this order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the first schedule having regard to his occupation and the area of employment. 2. An employee shall be issued on pay day with a payslip indicating all earning due to him and deductions made therefrom in respect of any matter." The first schedule mentioned hereinabove provided salary for a watchman as captured in paragraph 13(VII) of the Appellant's statement of claim as filed in the Lower Court. There is therefore no dispute that the Appellant was grossly underpaid and is therefore entitled to the underpayments sought. This Honourable Court (Keli J) in the case of Board of Management Milo Boys High School vs Margaret Nafula Wakhungu [2024] KEELRC 1685 (KLR) held among other issues relevant to this appeal at paragraph *17* that: - "17. There was evidence before the trial Court that the Claimant was cook. He was paid a monthly all-inclusive salary of Kshs. 7,000/=. a 18. The Court finds that the defence of contract on salary could not hold water in view of the provisions of Section 26 of the *Employment Act*..... 19. The Court upholds the decision of the Learned Trial Magistrate that the Respondent was underpaid." The Appellant's salary at the time of exit on 31/7/2019 was earning a basic salary of Kshs. 7,000/=. The minimum basic salary for a watchman at that time was Kshs. 12,926.55. The previous years of the Claimant's employment he was also underpaid as shown and demonstrated at paragraph 13 of the Appellant's statement of claim which is at page 10 of the Record of Appeal.

46.)Certificate of service- It is the Appellant's case that he was not issued with a Certificate of service at the time of his termination and prays that the Honourable Court orders issuance of the Certificate of Service in accordance with Section 51 of the *Employment Act*, 2007.

Respondent's submissions

47. Ground 3, 4 & 7. These grounds are on house allowance, leave, overtime and public holidays respectively. No evidence was brought forth by the Claimant to show that the salary was basic. The Respondent on the other hand gave evidence that the salary was gross pay. It is trite law that he who avers must prove. We reiterate the decision of Nairobi Employment & Labour Relations Court Cause No. 568 of 2015 Emily Wambui Nguura v Safaricom Kenya Limited [2020] eKLR . This principle was restated with authority in Thika High Court Civil Appeal No. 14 of 2024 Springboard Capital Limited v Njenga & another [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment) It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-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. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act. Paragraph *28 – 29* 16. This Court has frowned upon situations where Claimants just lump all manner of unsubstantiated claims including all public holidays and hours beyond the agreed hours without making any effort to guide the Court with specificity as to the mathematical quantum of their claim. This was in Nakuru Employment & Labour Relations Court Appeal E003 of 2023 Togom v Radar Limited [2024] KEELRC 112 (KLR) (1 February 2024) (Judgment) On off days claim, the Respondent submitted that the appellant was granted 4 off days in a month as such is not deserving off days claim. Additionally, that the claim for overtime, public holidays and leave was not pleaded with specificity in the claim as such cannot be awarded. To support this view, he relied on the case of KUDHEIHA Workers Vs Charles Waithaka Goka t/a Apple Bees Pub and Restaurant [2013] eklr where the Court held that;-"... There is a tendency for Claimants seeking overtime pay to just throw all the public holidays in a calendar, all the hours beyond the agreed working hours on the clock, and all

the years served, in the face of the Court and hope they make a credible case for overtime. Claimants of overtime must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable and factually credible system of overtime pay. The Claimant did not do this to the satisfaction of the Court." A similar view was upheld in the case of Charles Nguma Maina Vs Riley Services Limited [2018] eklr where the Court cited the case In Fred Makori Ondari v The Management of the Ministry of works Sports Club [2013] eKLR at paragraph *12*, Rika J held – "He does not give details of the overtime done whether it was authorized by his employer; whether he ever demanded for payment while on duty; and why he would wait until termination to claim overtime pay that accrued from as early as 10 years prior to termination ..... The prayer for overtime pay is rejected ..... If he intended to pursue service pay under this head, he would not be entitled to service pay as he was registered under the National Social Security Fund. This prayer is rejected."

48. On the claim for public Holidays, it was submitted that the trial Court found that the appellant had not specified the number of public Holidays worked as such the claim was not tenable. A Position, which the Respondent agrees with and supported by citing the case of Patrick Lumumba Kimuyu Vs Prime Fuels(K) Limited [2018] eklr where the Court held that;- "Whereas we appreciate that the *employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked. On the other hand, we note that the respondent produced before court several receipts for allowances paid to the appellant, which given the paucity of evidence in support of the appellant's claim could as well have been payments for public holidays and/or Sundays worked." The Court also found indeed that, just like herein There is no indication in these proceedings that the claimant sought to proceed for leave within the period of employment and the same was denied. Accordingly, we humbly submit that these grounds must also fail.

49. Ground 5: This ground is on Service gratuity. We reiterate that here is no legal right under the *Employment Act* known as Service gratuity. It is an unknown prayer and it is not sustainable. A party is bound by its pleadings and a party cannot depart from his pleadings so as to alter the prayer in the submissions and call it service pay, as the Appellant attempted to do. Further a claim of 18 days for every year is not on any legal ground. The *Employment Act* at Section 35 provides for 15 days. The High Court in Nyeri High Court Civil Appeal No. 48 OF 2022 Muchiri v Boresha Maisha Self Help Group [2024] KEHC 2488 (KLR) (11 March 2024) (Judgment) citing the authority of the Supreme Court made the following statement The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: - "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....." The Court also affirmed that evidence that departs from pleadings is for rejection In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -" 11.It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance

with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: - ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation." Further as we shall show shortly, the Appellant never at any one time during the nine years that he served the Respondent, raised this issue. He waived his right and cannot be heard to come around and claim it. The doctrine of estoppel by conduct was discussed in Nyamira High Court Civil Appeal No. E048 of 2023 Nyakundi v CIC General Insurance Co. Limited [2024] KEHC 6527 (KLR) (23 May 2024) (Judgment) in the following terms I further find that due diligence required that once the Respondent received the statutory Notice, they ought to have verified the details of the Insured, the vehicle and the policy number from their system before instructing counsel to appear on behalf of the Defendants in the primary suit. I find guidance in Halsbury's Laws of England in Vol. 16 (2) at paragraphs 1076 and 1079 which states as follows on the doctrine of estoppel: - "1076. Common law estoppel by representation arises where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. It seems that, in contrast to the position where promissory estoppel or proprietary estoppel arises, there is no additional requirement of unconscionability.....1079. In order for a common law estoppel by representation to arise, the person to whom the representation is made must have changed his position in some way to his detriment. In doing so, he must have relied on the representation, although that need not have been the sole cause of his change of position." Similarly, in Serah Njeri Warobi vs. John Kimani Njoroge [2013] eKLR, the court held as follows: - "The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

50. Ground 8: This ground is on underpayment. This ground has been couched in such general terms that the Court cannot with certainty determine the same as proved. While the general wage guidelines are a matter of law, the actual level of underpayment is a question of fact, to be brought forward through evidence. This has not been done. The Appellant has not laid any basis whatsoever to prove underpayment. He has for example not exhibited any authority or wage guideline that can guide the Court to sway its wisdom in his favour, We have already shown above that he who avers must prove. It is not enough for An Appellant to pluck figures from the air and bandy them before Court. The Court of Appeal in Nairobi Court of Appeal Civil Application No. Sup. 10 of 2014 Stephen Muriithi v Daniel Toroitich Arap Moi & another [2014] eKLR made this time tested and sanctified statement of principle The quintessential statement of the law in this regard is as follows: "Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallized, or because it can be measured with complete accuracy, the exact loss must

be pleaded as special damages". (See MCGREGOR ON DAMAGES, (10th Edition), Para 1498). In BANQUE INDOSUEZ VS D J. LOWE & COMPANY LTD (2006) 2 KLR page 208, at page 222, this Court stated the principle thus: "It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves." In Naivasha High Court Civil Appeal No. 44 of 2015 Kenya Pipeline Company Limited v Lucy Njoki Njuru (Suing as the legal representative of the Estate of John Wamae (Deceased) [2016] eKLR the Superior Court declined to find a party's income on the basis of some minimum wage guidelines that had not been canvassed at trial, and where the trial Court had found as a fact that the Plaintiff 's work had been wrongly defined, and said The Defendants had in their submissions in the lower court proposed a sum of Shs 5,000/= as monthly income. They cannot be heard in this court to propose a sum of Shs 3,000/=. Nor canvass figures based on the gazetted minimum wage for an unskilled labourer which were not canvassed at the trial. The trial court found as a fact that the deceased was a hawker not an unskilled labourer. There was no justification therefore for the court to resort to the minimum wage reserved for unskilled labourers. . In Mombasa Employment & Labour Relations Court Cause No. 541 OF 2017 Geofrey Khisa Mukanda v El-Bari Security Services Limited [2019] e KLR the Claimant had even shown a Wage Order. The Court was not convinced The Claimant further claims underpayment and overtime compensation. He however did not adduce any evidence to support these claims. In the final submissions filed on behalf of the Respondent on 30th January 2019, reference was made to the decision in Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR where my brother, Rika J held that the burden of establishing extra hours worked rests with the employee. Regarding the claim for underpayment, I have this to say; although the minimum wage payable to specific categories of employees is a matter of law, an employee alleging underpayment has the responsibility of establishing the actual level of underpayment based on the applicable minimum wage and the salary paid over a specific period. It is not enough for an employee to simply throw a Wages Order at the Court. This is what the Claimant did and his claim for underpayment was not proved. In addition, and without prejudice to the foregoing, at no point did the Appellant complain to the Respondent or raise the issue during the period of employment. He drew a salary and benefited from the employment contract for 9 years. This prayer is an afterthought. He cannot now turn around and claim to benefit from his own negligence. This in our view is barred from the evidentiary estoppel subject of Section 120 of the *Evidence Act*. In Nairobi High Court Commercial & Tax Division HCCC No. 361 of 2016 XRX Technologies Limited v Maseno University [2020] eKLR the Court expressed itself thus, confronted with a similar situation I further find that having voluntarily entered into the Agreement and benefited from it, the defendant cannot be seen to turn around and disown it on the basis of non-compliance with the procurement laws. I am guided by the decision in Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & another [2016] eKLR wherein the court held that: "just as policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is unsustainable." My further finding is that as a public institution of higher learning of repute, the defendant was expected to ensure that all its dealings were above board including its compliance with the procurement laws. I am also persuaded that the doctrine of estoppel is applicable in this case as observed by the plaintiff who referred to Halsbury's Law of England which states as follows: - "estoppel by conduct, otherwise known as estoppels inpais, arises where a person has by words of conduct made to another clear and unequivocal representation of fact, either with knowledge of its falsehood of with the intention that it should be acted upon, or has so conducted himself that another would, as a

reasonable person understand that a certain representation of fact was intended to be acted upon and the other person had acted upon such representation and thereby altered his position. The estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise then he represented it to be. Estoppel by conduct is generally regarded as a rule of substantive law....” Paragraph *25 - 26* 27. The Appellant waived his right and is barred by the doctrine of waiver and acquiescence from making the claim now. He even pleaded that he was not aware of her right and even if that were the case, he must be presumed to know the law. The Court of Appeal explained waiver in Nairobi Court of Appeal Civil Appeal No. 162 of 2015 John Mburu v Consolidated Bank of Kenya (2018) e KLR as follows; ... A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR, Maraga, J. (now Chief Justice) stated: “A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.” The Appellant is guilty of waiver, acquiescence and latches. In Kericho Employment & Labour Relations Court Cause No. 42 of 2018 Alexander Kimutai Rotich v Governor, County Government of Kericho & another [2019] eKLR the Court was willing to find for a Respondent where a Claimant had slept on his right. It held Further, the respondent relied on the authority of Rajnikanthkhetshi Shah v Habib Bank A.G. Zurich [2016]Eklr where the court observed as follows; In law waiver of a right or relief may be express or implied. Almost no difficulty arises where the waiver is made expressly by consent and the party benefiting from it has acted on upon it: that is sufficient consideration. Where waiver is not express and is to be implied from the conduct of the parties, the court has to consider the entire circumstances of the case to establish conduct which is inconsistent with the continuance of the right. See The Laws of England, eds. Viscount Simonds, Vol. 14, London: Butterwoth & Co. [1956] para 1175. That is the law on waiver. I will now re-state the concept of acquiescence. According to the Laws of England (ibid) para 117: “The term “acquiescence” is used in two senses. In its proper legal sense, it implied that a person abstains from interfering while a violation of his legal rights is in progress; in another sense implies that he refrains from seeking redress ....., of which he did not know at the time, is brought to his notice. Here the term is used in the former sense; in the second sense acquiescence is an element in laches”. . Conclusion: We have shown that this is a clear case of desertion, and indeed add that the Appellant ought to properly have refunded the Respondent one- month salary in lieu of notice. We have also shown that all the other grounds are unproven on the whole and are for dismissal.

Decision on reliefs sought in the claim

51. The court already held the appellant’s employment was not terminated but he absconded. That the Respondent failed to comply with section 41 of the *Employment Act* after the absconding hence Notice pay was awarded as claimed for Kshs. 12926.

52. The claims for continuing injury filed within 12 months were available for consideration by the court.

53. House allowance - The same is statutory. The court found that the salary, having been below minimum wages it could not be said to have been consolidated. The same was awarded as prayed. Housing allowance Kshs. 178386.39

54. Service pay is awarded for 7 completed years as the employer did not contribute to NSSF. Service pay for 7 complete years 62644.05

55. Overtime and public pay is denied on account of the claimant having been held to have been moonlighting and working for another employer during employment.

56. Leave . The claimant never pleaded that he applied for leave and it was denied. For lack of evidence of the leave documents as promised by the respondent in their reply at paragraph *9* (page 17 of ROA) the court on first appeal awards 18 months leave days under section 28 (4) of *Employment Act* converted to Kshs. 19,389.82

57. Underpayment is allowed as no employer should pay below minimum wage even if the claimant agreed to take the wages. Section 26 of the *Employment Act* provides:-'26(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 favourableterms and conditions of service shall apply.." Regulation of Wages Order, 1982, Regulation 3 provides:-
>
> '(1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First or Second Schedule, having regard to his age and to the circumstances of his employment by reference to columns 2, 3 and 4 thereof and to the nature of his occupation, as listed in column 1 thereof to be determined by reference to the definitions contained in the Third Schedule.
>
> (2) An employer shall ascertain the basic minimum wage to which any person employed by him is entitled under the provisions of this Order by reference to the particulars of his birth or apparent age." The court finds that the claimant was paid below the relevant wages orders as pleaded. The court awards back pay for underpayments from 1st November 2011 to 31st July 2019 for the sum of Kshs.431,663.85.

58. Certificate to issues under section 51 of the *Employment Act*

CONCLUSION

59. The appeal is allowed. The Judgment and Order of the Honourable H. M. Ng'ang'a (PM) delivered at Nairobi on the 16th of March, 2023 in MCELRC No. 2333 of 2019 is set aside and substituted as follows:-

> Judgment is entered for the claimant against the respondent as follows:-
>
> a. The court held there was no procedural fairness
>
> b. Notice pay award in lieu Kshs. 12926.55
>
> c. Leave pay for 18 months Kshs. 19,389.82
>
> d. Housing allowance 178386.39
>
> e. Service pay for 7 complete years 62644.05
>
> f. Underpayments from 1st November 2011 to 31st July 2019 for the sum of Kshs.431,663.85.

g. Total sum awarded(b-f above) Kshs. 705,010.66 with interest at court rate from judgment date.

h. Certificate of service

i. Costs of the suit.

60. Costs in the appeal awarded to the appellant.

61. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY , 2025.

J.W. KELI,

JUDGE

In the presence of -

Court Assistant: Otieno

Appellant : Nyabena

Respondent:-Githinji

Further court order

Stay of 30 days granted

J.W. KELI,

JUDGE

23/05/2025