



**Wakhu & another v Kassim & 2 others (All Sued in their Capacity as the Registered Trustees of Markazul Hidaya) (Employment and Labour Relations Appeal E131 of 2023) [2025] KEELRC 1347 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1347 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E131 OF 2023**

**JW KELL, J**

**MAY 9, 2025**

**BETWEEN**

**JUMA MIRAKAU WAKHU ..... 1<sup>ST</sup> APPELLANT**

**SWAIBU OKILLO RAMADHAN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MOHAMED KASSIM ..... 1<sup>ST</sup> RESPONDENT**

**MOHANNED RASHID ..... 2<sup>ND</sup> RESPONDENT**

**ABDIRAHMAN GULEID ..... 3<sup>RD</sup> RESPONDENT**

**ALL SUED IN THEIR CAPACITY AS THE REGISTERED TRUSTEES OF  
MARKAZUL HIDAYA**

*(Being an Appeal from the Judgment of the Honourable B.C Mulemia (CM)  
delivered in Nairobi on the 12th June, 2023 in Nairobi CMEL No. E826 of 2020)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgment of the Honourable B.C. Mulemia (CM) delivered at Nairobi on the 12<sup>th</sup> June, 2023 in Nairobi CMEL No. E131 of 2023 between the parties filed a Memorandum of Appeal dated 11<sup>th</sup> July, 2023 seeking the following orders:
  - a). The trial court's entire judgement be set aside and in its place judgment be entered in line with the memorandum of claim as follows:
    - A. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.



- B. Maximum compensation for wrongful dismissal;
- C. Special damages
1. Juma Mirakau WakhU
    - i. One month's pay in lieu of Notice Kshs 17,412.00
    - ii. Damages for wrongful dismissal..... Kshs.208,944.00  
(Ksh 17,412.00 x 12)
    - iii. House Allowance .....Kshs. 74,943.00  
July 2016- March 2020 (15% of Ksh 15,142) Kshs. 2,271 x 33months
    - iv. Overtime..... Kshs. 540,738.00  
July 2016- March 2020(72-52 Hrs x 136.55 x 1.5 x 132wks)
    - v. Public Holidays .....Kshs. 64,078.00  
2018- 4 days (4dys x 12hrs x 2 x Ksh 136.55)= KSH 13,108.00  
2019. 12 days 12dys x 12hrs x 2 x Ksh 136.55)=KSH 39,326.00  
2020. 4 days (4 day x 12hrs x 2 x Ksh 121.30)=KSH 11,644.00.
  2. Swaibu Okilo Ramadhan
    - i. One month's pay in lieu of Notice..... Kshs. 17,412.00
    - ii. Damages for wrongful dismissal .....Kshs. 208,944.00  
(Ksh 17,412.00 x 12)
    - iii. House Allowance.....Kshs.88,569.00  
January 2016 - March 2020 (15% of Kshs. 15, 142) Ksh 2,271 x 39months
    - iv. Overtime.....Kshs. 639,054.00  
January 2016- March 2020 (72-52 Hrs x 136.55 x 1.5 x 156 wks)
    - v. Public Holidays.....Kshs. 64,078.00  
2018-4 days (4dys x 12hrs x 2 x Ksh 136.55)=KSH 13,108.00  
2019-12 days) 12dys x 12hrs x 2 x Ksh 136.55)=KSH 39,326.00  
2020-4 days (4 day x 12hrs x 2 x Ksh 121.30}=KSH 11,644.00
- D. Interest on the total.
- E. Certificate of Service.
- F. Costs of the Cause.
- G. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.



In line with the prayers contained in the memorandum of claim dated 18th day of August 2020.

- b) Costs of the appeal to be awarded to the appellant

### **- The Grounds Of The Appeal**

2. The learned magistrate erred in law by failing to consider the provisions of Section 41 of the Employment Act and the burden placed on the Employer to justify the termination.
3. The trial court erred by failing to make a finding that the termination was unfair hence wrongfully failed to award the damages sought.
4. The learned magistrate failed to consider section 31 of the Employment Act as read together with regulation 5 of the Regulation of wages protective security services with regard to the issue of house allowance.
5. The learned magistrate failed to consider section 27 of the Employment Act as read together with regulation 6 and 7 of the Regulation of wages -e protective security services with regard to the issue of overtime.
6. The learned magistrate failed to consider section 27 of the Employment Act as read together with regulation 9 of the Regulation of wages protective security services with regard to working on public holidays.
7. The learned magistrate failed to consider section 28 of the Employment Act as read together with regulation 10 of the Regulation of wages protective security services with regard to the issue of annual leave.
8. The trial court failed to consider the claimant's authorities and submissions touching on the issue of redundancy thereby arriving at a wrong conclusion in law.
9. The trial court failed to consider section 48(1) a and b of the labour institutions act thereby leading to an error whose effect was dismissal of the claimant's special damages.
10. The trial court failed to consider the provisions of section 10(70 and Section 74 of the Employment Act and placed an unjustified burden of proof on the claimant .
11. The Trial court failed to consider the minimum wage order with regard to basic minimum wage thereby wrongfully dismissing the claimant's prayer for underpayments.
12. The learned magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.

### **Background Of Appeal**

13. The Claimant/Appellant filed claim against the Respondent vide a Memorandum of Claim dated 18<sup>th</sup> August, 2020 seeking the following orders:-
  - A. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
  - B. Maximum compensation for wrongful dismissal;
  - C. Special damages



3. Juma Mirakau Wakhu
    - iii. One month's pay in lieu of Notice Kshs 17,412.00
    - iv. Damages for wrongful dismissal..... Kshs.208,944.00  
(Ksh 17,412.00 x 12)
    - iii. House Allowance .....Kshs. 74,943.00  
July 2016- March 2020 (15% of Ksh 15,142) Kshs. 2,271 x 33months
    - iv. Overtime..... Kshs. 540,738.00  
July 2016- March 2020(72-52 Hrs x 136.55 x 1.5 x 132wks)
    - v. Public Holidays .....Kshs. 64,078.00  
2018- 4 days (4dys x 12hrs x 2 x Ksh 136.55)= KSH 13,108.00  
2019. 12 days 12dys x 12hrs x 2 x Ksh 136.55)=KSH 39,326.00  
2020. 4 days (4 day x 12hrs x 2 x Ksh 121.30)=KSH 11,644.00
  4. Swaibu Okilo Ramadhan
    - iii. One month's pay in lieu of Notice..... Kshs. 17,412.00
    - iv. ii. Damages for wrongful dismissal .....Kshs. 208,944.00  
(Ksh 17,412.00 x 12)
    - iii. House Allowance.....Kshs.88,569.00  
January 2016 - March 2020 (15% of Kshs. 15, 142) Ksh 2,271 x 39months
    - iv. Overtime.....Kshs. 639,054.00  
January 2016- March 2020 (72-52 Hrs x 136.55 x 1.5 x 156 wks)
    - v. Public Holidays.....Kshs. 64,078.00  
2018-4 days (4dys x 12hrs x 2 x Ksh 136.55)=KSH 13,108.00  
2019-12 days) 12dys x 12hrs x 2 x Ksh 136.55)=KSH 39,326.00  
2020-4 days (4 day x 12hrs x 2 x Ksh 121.30}=KSH 11,644.00
  - D) Interest on the total.
  - E) Certificate of Service.
  - F) Costs of the Cause.
  - G) Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.
14. The Claimants filed their verifying affidavit, Witness statements of the Claimant and list and bundle of documents of even date (see pages 26-39 of ROA).
  15. The claim was opposed by the Respondent who entered appearance and filed a Statement of Defence to the Memorandum of Claim dated 18<sup>th</sup> November, 2020 ,Respondent's list of witnesses and Witness



Statement of Abdirahman Guleid and respondent's list and bundle of documents all of even date(Pages 46-75 of ROA ).

16. The claimant's case was heard on the 24<sup>th</sup> August, 2021 where the claimants testified in the case, they adopted their Witness Statements as their evidence in chief and produced their list of documents dated 18<sup>th</sup> August, 2020 as exhibits. The Claimant's were cross-examined by Counsel for the Respondent Mr. Adan (see pages 97-98 of ROA).
17. The Respondent's case was heard on 5<sup>th</sup> April, 2022 where the Respondent's witness Mr. Abdirahman Guleid testified on behalf of the Respondents and was cross-examined by counsel for the Claimant Mr. Wetaba(Pages 102-104 of ROA).
18. The parties took directions on filing of written submissions after the hearing. The parties complied.
19. The Trial Magistrate Court delivered Judgment on the 12<sup>th</sup> June, 2023 partly in favour of the Claimants awarding the Claimant's nominal damages as follows: Juma Mirakau Wakhu at Kshs. 52,236 being the aggregate amount equivalent to three months' salary, Swaibu Okilo Ramadhan at Kshs. 52,236 being an aggregate amount equivalent to three months' salary; the Respondents' to issue each claimant with a Certificate of service forthwith; and no orders as to costs. (Judgment at pages 107-110 of ROA).

### **Determination**

20. The appeal was canvassed by way of written submissions. Only the Appellants filed.
21. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [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.”

22. The court on first appeal 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**

23. The Appellant submitted its grounds of appeal as its issues for determination.
24. The Respondent did not file their written submissions.
25. The court on perusal of the appeal found that the trial court held that the termination was unfair. There was no cross – appeal. The only issue then for determination was:- Whether the trial court erred award of compensation of damages Whether the appellants were entitled to reliefs sought in the claim.



### **Whether the trial court erred award of compensation of damages**

26. The ground of appeal on the issue were stated as follows:--

Ground 1. The learned magistrate erred in law by failing to consider the provisions of Section 41 of the Employment Act and the burden placed on the Employer to justify the termination

Ground 2. The trial court erred by failing to make a finding that the termination was unfair hence wrongfully failed to award the damages sought.

27. The Trial Magistrate Court delivered Judgment on the 12<sup>th</sup> June, 2023 partly in favour of the Claimants awarding the Claimant's nominal damages as follows: Juma Mirakau Wakhu at Kshs. 52,236 being the aggregate amount equivalent to three months' salary, Swaibu Okilo Ramadhan at Kshs. 52,236 being an aggregate amount equivalent to three months' salary; the Respondents' to issue each claimant with a Certificate of service forthwith; and no orders as to costs(page 110 of ROA)

28. During the trial, the 1<sup>st</sup> appellant told the court that, 'I was never arrested for my theft incident'. At cross-examination the 1<sup>st</sup> appellant admitted he was issued with warning letters on claim of stealing of which he apologised and the letters related to theft and that there was a meeting. He stated he was not issued with show cause letter. The 2<sup>nd</sup> appellant recalled having written an apology letter for some items that had been found missing of which he stated he was forced to write to keep his job. He stated he was not issued with a warning letter.

29. Both appellants having admitted to have apologised for the theft allegations and having had a meeting with the employer over the issue, I find no basis to disturb the finding of the trial court on the validity of the reason for termination.

30. On procedural fairness the trial court held that there was no disciplinary hearing before the termination under section 41 of the Employment Act. The appellants were then awarded three months salary for the procedural unfairness in the termination. Section 49 of the Employment Act provides for various remedies of which the trial court may choose. On procedural fairness notice pay applies. The court found it was erroneous to award the appellant three months' salary while the only issue was procedural fairness of which 1 month notice pay applied under section 35 of the Employment Act as there was no contract of employment or CBA. The award is substituted subsequently with one month notice pay notice. The employee cannot be compensated where the reasons for the termination based on misconduct are held as valid like was in the instant case.

### **Whether the appellants were entitled to reliefs sought in the claim Housing allowance**

31. The ground of appeal was :- The learned magistrate failed to consider section 31 of the Employment Act as read together with regulation 5 of the Regulation of wages protective security services with regard to the issue of house allowance. The appellants in their claim pleaded that the 2018 minimum wages for night guard was Kshs. 15141.95 The Claimants' salary was Kshs. 15000. They were thus paid below minimum wages. The house allowance at 15 % was sought for Kshs. 2271.30 making lawful salary to be Kshs. 17413.25. This claim was not disputed. Section 31 of the Employment Act provides for housing as a statutory right. The claimants were not housed and were thus entitled to the house allowance. The trial court erred for not make a finding on the same before dismissing the claim. The award of back pay is limited to 12 months being continuing injury under section 89 of Employment Act. The employee alleged the termination in 2020 and the claim was filed in the year hence valid and is awarded as sought in the claim for each of the appellants.



### **Overtime and Public holidays.**

32. There was no prove of these excess hours worked. It is not possible that the employees worked all round the clock. In *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016)e KLR it was held that in a claim for overtime, the default of employer to produce records does not establish the claim. That the burden of establishing hours or days served in excess of the legal maximum rests with the employee. I find no basis to interfere with the finding of the trial court on the same. (*Mbogo v Shah*)

### **Conclusion**

33. The appeal is allowed. the Judgment of the Honourable B.C Mulemia (CM) delivered in Nairobi on the 12<sup>th</sup> June, 2023 in Nairobi CMEL No. E826 of 2020 is set aside and substituted as follows:
1. The claimants' employment was unprocedurally terminated. Judgment is entered for each of the 2 claimants against the respondent as follows:-
    - a. Juma Mirakau Wakhu Notice pay of one month to each of the claimants Kshs. 17412. Back pay House allowance to each of the claimant for Kshs. 88,569/- Certificate of service Interest at court rates from date of judgment and costs of the suit
    - b. Swaibu Okilo Ramadhan Notice pay of one month to each of the claimants Kshs. 17412. Back pay House allowance to each of the claimant for Kshs. 88,569/- Interest at court rates from date of judgment and Costs of the suit. Certificate of service to issue to the claimants.
34. The appellants are awarded costs of the appeal.
35. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY , 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellants : -Wetaba

Respondents:- Ms. Oluoch

JUDGMENT IN NAIROBI ELRCA NO. E131 OF 2023 Page 9 | 9

