



Nduru v Avenue Service Station Ltd (Employment and Labour Relations Cause 839 of 2018) [2025] KEELRC 1939 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1939 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 839 OF 2018**

BOM MANANI, J

JUNE 30, 2025

BETWEEN

SIMON WANGAI NDURU CLAIMANT

AND

AVENUE SERVICE STATION LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant has challenged the legitimacy of the Respondent's decision to terminate his contract of service on account of attainment of retirement age. It is his case that the decision was unlawful. As such, he claims for various reliefs including: compensation for unfair termination of his contract; payment of salary for the unexpired term of his contract; payment of commuted leave days among others.
2. On the other hand, the Respondent has resisted the claim. It contends that the decision to terminate the Claimant's employment on account of attainment of retirement age was legitimate.

Claimant's Case

3. The Claimant contends that he was employed by the Respondent in the position of a driver for the period between February 2009 and May 2015. He contends that the Respondent forcibly retired him from employment on 31st May 2015 without giving him the requisite notice.
4. The Claimant avers that at the time he was forced into retirement, the Respondent had issued him with a fresh contract which was to run from January 2015 until December 2015. He thus contends that the Respondent unlawfully terminated his contract of service.
5. The Claimant further avers that during his term of service, the Respondent underpaid his salary. He contends that the Respondent used to pay him Ksh. 7,012.00 per month instead of the minimum salary of Ksh. 10,405.00 (excluding house allowance) as per the prevailing minimum wage guidelines.



6. The Claimant further contends that during his tenure of service, the Respondent only allowed him to take leave for five (5) days. As such, he contends that the Respondent owes him one hundred and thirty nine (139) accrued leave days.
7. The Claimant also contends that during his term of service, the Respondent would sometimes require him to work during public holidays and on Sundays. He contends that the amount due to him for services rendered during such times stood at Ksh. 20,680.00.
8. The Claimant also contends that the Respondent negligently failed to remit his contributions to the National Health Insurance Fund (NHIF) and the National Social Security Fund (NSSF). He further asserts that the Respondent did not remit his Pay as You Earn (PAYE) tax. He thus claims for terminal benefits to wit the following:-
 - a. Compensation for wrongful termination of his contract of service.
 - b. Salary for the remainder of his contractual term falling between June 2015 and December 2015.
 - c. One month salary in lieu of notice.
 - d. Underpaid salary for the contractual period.
 - e. Outstanding annual leave for 139 days.
 - f. Pay for public holidays worked.

Respondent's Case

9. The Respondent does not admit the claim. It denies all the assertions in the Statement of Claim.
10. The Respondent avers that the contract of 25th February 2009 which the Claimant seeks to rely on is forged. It contends that the Claimant forged the instrument by superimposing his details in a contract which had been issued to one Francis Njeru Kiragu on 25th February 2009.
11. At the time that the Respondent filed the statement of defense, it averred that it was taking steps to institute criminal proceedings against the Claimant for the alleged forgery. However, it remains unclear whether this was ever done.
12. The Respondent denies that the Claimant was forced to retire from employment. It contends that he retired after attaining the mandatory age for retirement.
13. The Respondent asserts that retirement age is anchored on statute. As such, it cannot be changed by agreement of the parties. It further avers that it issued the Claimant with the requisite retirement notice.
14. The Respondent denies that it underpaid the Claimant's salary as he alleges. It contends that it paid his salary in accordance with the prevailing Wage Orders. It further contends that it paid him house allowance as per the law.
15. The Respondent further avers that it remitted the Claimant's NSSF, NHIF and PAYE statutory deductions to the relevant agencies. It avers that when the Claimant was retired, his exit salary and other benefits were computed and a final pay cheque prepared for him. However, he refused to collect it.
16. The Respondent contends that the Claimant had forty seven (47) accrued leave days when he retired. It contends that the leave days were commuted and the leave pay included in the Claimant's last pay cheque which he refused to collect.



17. The Respondent denies that the Claimant ever worked outside normal work hours. As such, it disputes the claim for overtime pay.
18. The Respondent avers that as a matter of policy, it used to pay its drivers, including the Claimant, a daily allowance of Ksh.600.00 to cover any incidences of working beyond the stipulated work hours. It further contends that the Claimant used to receive a further Ksh. 1000.00 per month whenever schools were in session to cover all incidentals including overtime.
19. According to the Respondent, the Claimant's work involved driving a school van to pick and drop school children. As such, it is implausible that he was required to be at work at 4.00 AM as the vans are usually released at 6.30 AM to pick the children. The Respondent contends that the Claimant should not mistake the time he used to leave his house for work with the official reporting time.

Issues for Determination

20. After analyzing the pleadings, evidence and submissions by the parties, the following issues present for determination:-
 - a. Whether the Claimant's amended Statement of Claim was filed out of time and whether the claim should be struck out for this reason.
 - b. Whether the contract instruments dated 25th February 2009 and 1st January 2015 are forgeries.
 - c. Whether the Respondent is entitled to object to the production of the two instruments at the stage of final submissions.
 - d. Whether the Respondent's witness required the written authority of the Respondent in order to testify in the cause.
 - e. Whether the employment relationship between the parties was legitimately terminated on account of retirement.
 - f. Whether the Claimant is entitled to the reliefs that he seeks in the proceedings.

Analysis

21. By the court's ruling dated 23rd November 2022, the Claimant was granted fourteen (14) days to file and serve an amended Statement of Claim with effect from the date of the ruling. It appears that he filed the amended pleading on 9th December 2022, sixteen (16) days down the line. In effect, the amended Statement of Claim was filed two (2) days outside the appointed time.
22. The Respondent urges the court to find that the pleading was improperly filed. It submits that the pleading should be struck out for this reason.
23. Although the Respondent urges the court to strike out the amended Statement of Claim for having been filed outside the time that had been granted for filing it by two (2) days, it does not speak to the prejudice that it suffered as a result of these two days delay. The court is alive to the constitutional dictate to administer justice without undue regard for procedural technicalities (see article 159(2) (d) of *the Constitution*). This requirement is reiterated in section 20(1) of the *Employment and Labour Relations Court Act*.
24. In the court's view, to strike out a pleading because it was presented marginally late by two days when this delay has not been demonstrated to have occasioned prejudice to either of the parties to the suit



would constitute paying undue regard to a procedural technicality. This would work against the very constitutional and statutory edicts aforesaid.

25. Rule 80 of the Employment and Labour Relations (Procedure) Rules, 2024 provides as follows:-

“The Court may, upon application or on its own motion, extend any time prescribed under these Rules or such time as may be stipulated in an order of the Court.”

26. The rule empowers the court to enlarge time fixed by a court order on its own motion. This is particularly where the deviation from the court order is not demonstrated to have occasioned prejudice to the parties.

27. In the instant case, the two days delay in presenting the amended Statement of Claim has not been shown to have occasioned prejudice to the Respondent. As such, in order to give meaning to the principal objectives of the court as prescribed under section 3 of the [Employment and Labour Relations Court Act](#), I consider the amended Statement of Claim as having been properly filed despite the fact that it was presented two days outside the timelines that had been set in the court order of 23rd November 2022.

28. The Claimant contends that his first contract with the Respondent is the one dated 25th February 2009. However, the Respondent has denied this fact. It contends that the document is forged. It contends that the Claimant simply inserted his name in a contract that had been issued to another driver.

29. Although the Respondent disputed the authenticity of the contract dated 25th February 2009, it did not deny that it employed the Claimant in 2009 as claimed by him. Further, it did not produce an alternative contract which was issued to the Claimant to demonstrate that the one he tendered in evidence was not genuine.

30. It is noteworthy that in its statement of defense, the Respondent intimated that it will prefer criminal charges against the Claimant in respect of the alleged forgery of the document. However, at the time this matter went to trial, there was no evidence that this had been done. As such, the contention by the Respondent that the document was forged remains a mere allegation which is yet to be cogently established.

31. Forgery is a serious allegation. To establish it in civil proceedings, one must tender evidence that is beyond a balance of probabilities (*Kinyanjui v Kinyanjui & another* (Civil Appeal E201 of 2022) [2024] KEHC 11217 (KLR) (23 September 2024) (Judgment)).

32. In the instant case, I find that the Respondent did not present cogent evidence to the accepted standard of proof to demonstrate that the contract dated 25th February 2009 was forged. The evidence by the defense witness alleging discrepancies in the document did not satisfy this threshold. It would have been helpful for this purpose if the Respondent had subjected the document to forensic analysis by a certified document examiner and presented the report to court or if it had called the employee whose contract is said to have been forged as a witness in the matter.

33. In the premises, I find that the Respondent has failed to cogently demonstrate that the contract dated 25th February 2009 was forged. As such, I find that the contract is valid. Therefore, I arrive at the conclusion that the employment relation between the parties commenced in February 2009 as stated in the contract between them dated 25th February 2009.

34. Further, in their submissions, the Respondent’s counsel have asserted that the contract dated 1st January 2015 is a forgery. Yet, no such assertion was made by the Respondent both in the Statement of Defense and the written witness statements by its witnesses. Similarly, the witness who testified in court



- on behalf of the Respondent did not make such a claim. The assertion only arose through counsel's final submissions.
35. By counsel making this allegation in his final submissions, he was in effect giving evidence on alleged forgery of a document through submissions after the case had been closed. This is despite the reality that evidence cannot be tendered through closing submissions (see [Ogando v Watu Credit Limited & another \(Civil Suit E098 of 2022\)](#) [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment) & [Githaiga v Mwangi](#) [2024] KEHC 13449 (KLR)).
 36. The fact that the defense witness stated in his oral evidence that the Claimant was serving on permanent terms does not mean that the contract dated 1st January 2015 is a forgery. This evidence could and has indeed been rejected as will become apparent later in this decision. As such, the contention by counsel that the agreement of 1st January 2015 is a forgery is rejected on the foregoing account.
 37. In the Respondent's final submissions, its counsel objects to the production of the two contracts of service (the one dated 25th February 2009 and the other dated 1st January 2015) on the grounds that they are not only the products of forgery but are also photocopies. Yet and as the court record demonstrates, the defense team did not object to the production of the two documents at the time the Claimant tendered them in evidence alongside other documents during his oral testimony in court.
 38. If the defense counsel desired to object to production of the documents as exhibits for the Claimant, he ought to have done so at the point that the Claimant sought to have them produced as exhibits. Having failed to do so, the attempts to object to their production after they had already been produced in evidence and formed part of the court record comes too late and cannot be countenanced ([Church Commissioners for Kenya & another v Board of Management Oljoro Orok Primary School](#) [2019] eKLR).
 39. The Claimant's counsel has challenged the competence of the Respondent's witness to testify on its behalf. According to counsel, the witness required the Respondent's written authority to take to the witness stand. Counsel contends that in the absence of such authority, the testimony of the witness should not be considered.
 40. This proposition by counsel is not backed by any provision of law. So far as the court knows, any person who claims to have knowledge of an issue that is under consideration and who is not prevented from speaking to it by reason of infirmity of the mind arising from age or disease, is competent (though in some instances not compellable) to testify on it. Such person does not require the written authority of another in order to acquire this competence. All that the law is concerned with is his ability to speak to the matter at hand (see section 125 of the [Evidence Act](#)).
 41. Speaking to the matter, the court in the case of [Diesel Inject Services v Shajand Holdings Ltd \(Civil Appeal 53 of 2020\)](#) [2024] KEHC 4902 (KLR) (28 March 2024) (Judgment) expressed itself as follows:-

“I must first dispose of the question of whether a witness must produce authority to testify as a witness and my answer is a clear no. There is no legal basis at all for demanding that a witness for a company must produce authority to testify.”
 42. Counsel may have conflated the requirement for authority to represent and plead on behalf of a corporate body and a co-litigant with the function of testifying in court. These two are entirely distinct. Whilst authority to plead on behalf of others including a body corporate ought to be in writing, no such requirement applies to persons appearing in court for purposes of testifying on a matter (for general views on this, see [Simeon A. Oloo & 19 others v Lake Basin Development Authority](#) (Petition



E049 of 2021) [2022] KEELRC 87 (KLR) (16 June 2022) (Ruling) and [Diesel Inject Services v Shajand Holdings Ltd \(Civil Appeal 53 of 2020\)](#) [2024] KEHC 4902 (KLR) (28 March 2024) (Judgment).

43. It is not in dispute that the employment relationship between the parties came to a close after the Respondent issued the Claimant with a retirement notice dated 1st May 2015. Through the notice, the Respondent informed the Claimant that his services were to come to a close on 31st May 2015 on account of attainment of retirement age.
44. The Respondent's witness stated in court that in March 2015, the Respondent discovered that the Claimant had attained the age of sixty seven (67) years. The witness contended that this discovery was made after scrutinizing the Claimant's Identification Card which indicated that he was born in 1948.
45. It is the Respondent's case that following this realization, it issued the Claimant with the retirement notice dated 1st May 2015. As indicated earlier, the notice required the Claimant to exit employment on 31st May 2015.
46. The Claimant contests this decision. According to him, the Respondent had renewed his contract in January 2015 to run for another one year. As such, it was not open to it to retire him on account of age midstream.
47. The Claimant presented to court the contract between the parties dated 1st January 2015. The contract granted the Claimant a one year term effective 1st January 2015. In effect, it was to run up to 30th December 2015.
48. Although the Respondent's witness stated that the Claimant was serving on an indefinite term, he did not produce evidence to back this claim. This is notwithstanding that section 10(7) of the [Employment Act](#) places the burden of proof in respect of the contested term of the contract on the Respondent. As such, the only evidence on record demonstrates that at the time the Claimant's employment was terminated, he was serving on a one year fixed term contract effective from 1st January 2025.
49. The contract of 1st January 2015 does not make provision for termination of the Claimant's employment on account of attainment of retirement age. Neither does it speak to when the Claimant was to be deemed to have attained retirement age.
50. The law on employment relations in Kenya does not provide for mandatory retirement age for employees in the private sector. Retirement age is only fixed with respect to public sector employees (see sections 80 and 81 of the [Public Service Commission Act](#) as read with regulations 70 and 71 of the Public Service Commission Regulations, 2020 and article 167 of [the Constitution](#)).
51. The above being the case, if parties to an employment contract in the private sector wish to fix retirement age for the employee, they ought to do so expressly either in the contract instrument or in the applicable Human Resource Manual. However, if they omit to speak to the matter in either of the aforesaid instruments, the court will look at their conduct to infer if they had an implied agreement as regards the retirement age. This point is made in several judicial pronouncements (see Robert Kithinji Kiugu v AAA Growers Limited [2019] eKLR and Steel Makers Limited v Joshua Nzuki [2016] eKLR).
52. In the instant case, although the Respondent contended that retirement age for its employees was premised on its policy, it did not tender evidence of the alleged policy instrument in evidence to affirm its contention. As a matter of fact, during cross examination of the Respondent's witness, he confirmed that the alleged policy had not been produced in evidence.
53. In the Respondent's list of documents dated 18th October 2023, it included a document titled "Staff Memo" to suggest that its members of staff had been notified that their retirement age had been fixed



- at sixty five (65) years. However, the court notes that the document was unilaterally generated by the Respondent. As such, it is not possible to ascertain whether it was brought to the Claimant's knowledge as it does not bear an acknowledgment by him.
54. In any event, when the Respondent's witness testified in court, he did not allude to the aforesaid document. Instead, he stated that retirement age for the Respondent's employees was provided for in the Respondent's human resource policy document which was not tendered in evidence. As such, the court is unable to rely on the purported staff memo as evidence of the Respondent having set retirement age for its members of staff.
 55. As was stated in the two decisions alluded to above, absent evidence of an express agreement on the retirement age for an employee evidenced either in the contract between the parties or the employer's Human Resource Manual or a Collective Bargaining Agreement (CBA), the only other place the court should look at to ascertain whether parties to a contract of service in the private sector had agreed on retirement age would be the conduct of the parties. This will help the court to infer if there was an implied agreement on the subject.
 56. In the instant case, there is evidence that the Respondent granted the Claimant a new one year contract of service in January 2015. The contract was to run until 30th December 2015.
 57. During the testimony by the Respondent's witness, he said that the discovery that the Claimant had attained sixty seven (67) years was made in March 2015. As such, he contended that the decision to retire him (the Claimant) was made after this development.
 58. The fact of discovery by the Respondent in March 2015 that the Claimant had attained the aforesaid age does not imply that the parties had agreed that the Claimant will retire at the age of sixty five (65). As such, the court cannot rely on this discovery to infer an agreement between the parties that the Claimant's retirement age was to be sixty five (65) years.
 59. Further, during cross examination of the Respondent's witness, he confirmed that the Respondent was seized of the Claimant's personal data from inception of their relation. As such, when the parties executed the contract dated 1st January 2015 which granted the Claimant a further one year term of service, the Respondent knew or ought to have known that the Claimant was already beyond the age of sixty five (65) years. Thus, if the Respondent's policy did not permit it to engage staff aged above sixty five (65) years, it ought not to have granted the Claimant the fresh term of one year under the contract of 1st January 2015 as the Claimant's personal records in its (the Respondent's) custody demonstrated that he was sixty seven (67) years at the time.
 60. The fact that the Respondent proceeded to grant the Claimant a fresh term of one year despite the aforesaid reality implies that there was no agreement between the parties or provision in the Respondent's Human Resource Manual that the Claimant was to retire at the age of sixty five (65) years. In the premises, the court finds that the conduct of the parties does not support the fact that they had agreed on the Claimant's retirement at the age of sixty five (65) years.
 61. The foregoing being the position, was it open to the Respondent to retire the Claimant on account of attainment of retirement age when the parties had no agreement on retirement age? The answer to this question is in the negative. The Respondent could only have retired the Claimant on account of attainment of retirement age if this fact had been agreed on in the contract between the parties or was provided for in the Respondent's Human Resource Manual or the CBA between the Respondent and the Claimant's Trade Union.



62. Since there was no prior agreement on retirement age, the only option that was open to the Respondent was to engage the Claimant on the matter in order for them to reach consensus on it before the decision to retire the Claimant could be taken. However, this did not happen. As the record shows, the Respondent unilaterally took the decision.
63. The foregoing being the case, the court finds that the Respondent, in so far as it terminated the Claimant's employment on account of attainment of retirement age when there was no prior agreement on the subject and when the contract between the parties was silent on retirement age for the Claimant, was unlawful. It is so declared.
64. The next question for determination relates to whether the Claimant is entitled to the reliefs that he seeks through this claim. As is evident from the amended Statement of Claim, the reliefs which the Claimant seeks are a myriad. The court will consider each one of them separately.
65. The Claimant has prayed for compensation for the unfair termination of his contract of service. He also claims for payment of salary for the unexpired term of his contract.
66. As pointed out earlier, the parties had a one (1) year fixed term contract of service which they entered into on 1st January 2015. Although the contract ought to have run until 30th December 2015, it was terminated prematurely on 31st May 2015 when the Respondent purported to retire the Claimant on the ground of attainment of retirement age despite the absence of retirement age in the contract between the parties or the Respondent's Human Resource Manual or CBA with the Claimant's Trade Union (if any). As such, the Claimant is entitled to compensation for unfair termination of his contract.
67. At the time the contract between the parties was terminated, the balance of the term that the Claimant was to serve under it (the contract) was seven (7) months. As such, the loss that he suffered is equivalent to his salary for seven (7) months.
68. However, it is acknowledged that absent the aforesaid termination, the contract between the parties could still have terminated for any other legitimate reason before the end of its term. These include misconduct or incapacity on the part of the Claimant or redundancy. As such, there was no guarantee that the Claimant was, in any event, going to serve for the entire of the balance of his term.
69. The general position in law is that where a fixed term contract has a provision for its termination on notice, such contract may be terminated midterm for valid reasons. As such, there is no guarantee that an employee who is engaged under this kind of contract will serve for the entire of the term granted by it as either party to the contract has the right to invoke the notice clause to terminate it, subject of course to the presence of valid reasons for the decision (on the part of the employer) and adherence to due process. In the premises, unless the contract contains a specific clause which permits payment of salary for the unexpired term in the event that it is terminated midstream, the court should be reluctant to grant this kind of relief (see *Andrew Mwaniki Gachuba v National Oil Corporation of Kenya* [2018] eKLR and *Minnie Mbue v Jamii Bora Bank Limited* [2017] eKLR).
70. Clause five (5) of the contract between the parties dated 1st January 2015 provided for termination of the contract on notice. At the same time, there is not provision in the contract to suggest that the parties had agreed that should the contract be terminated prematurely, the Claimant will be entitled to be paid salary for the unexpired term of the contract. As such and guided by the above decisions, the court rejects the Claimant's prayer for salary for the balance of the contractual term.



71. The Claimant prays for compensation for unfair termination of his contract which is equivalent to his salary for twelve (12) months. Yet, as the record shows, at the time the Respondent purported to retire him, he had a balance of seven (7) months to the closure of his contract.
72. The foregoing being the case, the court cannot countenance the request for compensation that is equivalent to the Claimant's salary for twelve (12) months. Such an award will be unconscionable as it will overshoot the balance of the term of his contract.
73. Having regard to the duration which the parties had been in the employment relation and recognizing that the balance of the Claimant's term was seven (7) months and taking into account that the contract could have terminated for other valid reasons before the lapse of its term, I am minded to award the Claimant compensation that is equivalent to his salary for five (5) months only. According to the contract between the parties dated 1st January 2015, the agreed gross monthly salary for the Claimant was Ksh. 15,184.30. As such, I award him Ksh. 15,184.30 x 5 = Ksh. 75,921.50 as compensation for the unfair termination of his contract of service.
74. The Claimant has also claimed for notice pay of one month. In effect and by this, he implies that the Respondent did not give him notice to terminate his contract.
75. Although the notice for retirement was issued on 1st May 2015, it was expressed to take effect on 31st May 2015, one month down the line. This, to my mind, served as notice to terminate the contract.
76. Even though the termination was irregular, this does not take away the fact that the Respondent issued a one month's notice to close the contract. As such, the claim for notice pay is not valid as there was, as a matter of fact, notice to terminate the contract.
77. The Claimant has also claimed for payment of the amount he allegedly is entitled to on account of the work that he undertook during public holidays. This is despite the court having declined to grant him leave to include this claim in the amended Statement of Claim on account of it having been time barred at the time he sought to bring it on board (see paragraphs 7 & 9 of the court's ruling dated 23rd November 2022).
78. The court having declined to grant the Claimant leave to introduce the claim for public holidays' pay, it was improper for him to include this claim in the amended Statement of Claim. As such, the court declines this prayer.
79. The Claimant contends that the Respondent did not grant him leave for the duration of their contract. He contends that he was only allowed to utilize five (5) days of his annual leave thus leaving him with one hundred and thirty nine (139) days. In response, the Respondent contends that the Claimant utilized most of his earned leave days leaving a balance of fourty seven (47) unutilized days at the time he was retired.
80. Although the Claimant contends that he only utilized five (5) of his leave days leaving a balance of one hundred and thirty nine (139) unclaimed days, he did not provide clear prima facie data on this subject. For instance, it is unclear how he arrived at the conclusion that the balance of his accrued leave days was one hundred and thirty nine (139) and not less or more days. The Claimant simply plucked this figure from the air and affixed it in his Statement of Claim.
81. As a matter of fact, beyond pleading the fact of accrued leave days in the Statement of Claim, the Claimant did not speak to this matter in his written witness statement. As well, he did not speak to it during his examination in chief in court.



82. The only time that he mentioned the matter was during his cross examination and re-examination. At this point, he expressed himself on the subject as follows:-

“I never utilized leave days. I was not allowed to go on leave. I never wrote the documents purporting to be leave forms. I only used to be given a day or so off to attend to my issues. These were off days. They were not leave days....

I used to take some off days. However, I never took leave. I cannot remember the number of off days I took. Off days was not same as annual leave.”

83. The above statements are at cross purposes with the averments in the amended Statement of Claim on the subject where the Claimant expressed himself as follows:-

“.. by the time the services of the Claimant were terminated by the Respondent the Claimant was owed accumulated number of 139 leave days having taken only 5 leave days.”

84. In the Statement of Claim, the Claimant averred that he was owed 139 leave days and that he had utilized only 5 leave days during the term of his contract. Yet, in his oral testimony in court, he denied ever having utilized any of his leave days.

85. At the same time, in the Statement of Claim, the Claimant asserted that the total number of leave days owed to him was 139. Yet, this figure was not mentioned either in his written witness statement which he adopted on oath or his oral account in court.

86. Although the employer bears the overall burden of proof on most employment matters, the employee is nevertheless obligated to present a prima facie case to enable the employer to respond. In my view, the material which the Claimant placed on record in respect of his claim for annual leave are not only contradictory but insufficient to satisfy the threshold of a prima facie case.

87. In response to the Claimant’s claim for 139 accrued leave days, the Respondent contended that he had utilized all his leave days save for forty seven (47) days. The Respondent presented to court, in tabular form, its computation of the leave days that were earned by the Claimant during his tenure of service. According to it, the Claimant earned a total of one hundred and thirty three (133) leave days out of which he utilized 86.5 days leaving a balance of 46.5 days which were rounded off to 47. The Respondent provided further data from which it derived its workings (see pages 13 to 24 of the Respondent’s bundle dated 3rd December 2018).

88. The Claimant did not present evidence to controvert this data. That being the case, the court can only grant him forty seven (47) accrued leave days as conceded by the Respondent.

89. According to the last contract between the parties, the Claimant’s gross monthly salary was Ksh. 15,180.30. As such, his daily wage rate was Ksh. 506.01.

90. Applying the aforesaid figure to commute the Claimant’s accrued annual leave, his entitlement for the 47 leave days would be Ksh. 506.01 x 47 = Ksh. 23,782.47. Accordingly, the court enters judgment for him for Ksh. 23,782.47 on account of outstanding leave days as conceded by the defense.

91. The Claimant has further claimed Ksh. 255,774.70 on account of underpaid salary. However, he only tendered three sets of documents to speak to the salary he was earning. These are:-

- a. The contract between the parties dated 25th February 2009 which shows that the agreed basic salary for the duration of that contract (one year) was Ksh. 7,012.00. In addition, the parties agreed on house allowance of Ksh. 1,052.00 and some other allowances.



- b. The several pay slips for the year 2014 which show that the Claimant's gross salary during that period was Ksh. 15,200.00.
- c. The contract between the parties for the year 2015 which shows the Claimant was to earn gross salary of Ksh. 15,184.30 inclusive of house allowance.
92. Although the Claimant did not tender evidence to demonstrate the salary he was earning for the years 2010, 2011, 2012 and 2013, the Respondent filled this gap by providing data on the matter. As such, in analyzing whether the Claimant was a victim of underpayment of salary for the entire of his employment relation with the Respondent, the court will rely on the data that was furnished by both the Claimant and the Respondent on the subject.
93. With respect to the claim for underpayment during the year 2009, the Respondent tendered in evidence the Wage Order for that year which was published through [Legal Notice No. 70 of 2009](#). According to the instrument, the salary for drivers of light vans in Nairobi was fixed at Ksh. 8,274.00. This included house allowance.
94. From the contract dated 25th February 2009 between the parties, the Claimant was receiving a consolidated monthly pay of Ksh. 8,064.00 against the minimum wage of Ksh. 8,274.00 as per the applicable Wage Order. As such, he was being underpaid by Ksh. 210.00 per month. This means that he suffered underpayment of salary of Ksh. 210.00 x 12 = Ksh. 2,520.00 in the year 2009. Accordingly, the court enters judgment for him for the aforesaid sum of Ksh. 2,520.00 to cover underpaid salary for the year 2009.
95. For the year 2010, the evidence on record shows that the Claimant's consolidated salary was Ksh. 10,470.00 (see pages 76, 77, 78, 79 & 80 of the Respondent's trial bundle dated 3rd December 2018). The Respondent tendered in evidence [Legal Notice No. 98 of 2010](#) vide which the Wage Order for 2010 was published. According to the instrument, the Claimant's monthly salary, inclusive of house allowance, was to have been Ksh. 9,101.00. Yet, as per the payment vouchers on record, he was earning Ksh. 10,470.00 which was above the recommended minimum wage. As such, the court finds that the Claimant was not underpaid during the year 2010.
96. With regard to the contractual period 2011, several payment vouchers show that the Claimant's monthly salary was Ksh. 10,470.00 (see pages 70, 71, 72, 73, 74 & 75 of the Respondent's bundle of documents dated 3rd December 2018). The Respondent produced the Wage Order for the year 2011 which was published through [Legal Notice No. 63 of 2011](#). According to the instrument, the Claimant's minimum salary, inclusive of house allowance, for the year 2011 was to have been Ksh. 10,239.00. Yet, he was earning Ksh. 10,470.00. As such, his contention that the Respondent underpaid him in 2011 is without basis.
97. The Respondent further produced in evidence the payroll for some months in 2012 (see pages 51 to 63 of the Respondent's bundle of documents dated 3rd December 2018). The documents show that the Claimant's salary for that year was Ksh. 11,580.00 before it was increased to Ksh. 13,120.00 from July 2012.
98. The Respondent also produced the 2012 Wage Order published through [Legal Notice No.71 of 2012](#). It shows the minimum salary for drivers of light vans in Nairobi was fixed at Ksh. 11,580.00 for the year 2012. As such, going by this instrument, it is apparent that the Claimant was not underpaid for the year 2012.
99. The Respondent further produced the payroll for some months in 2013. It shows that the Claimant's salary was adjusted from 13,120.00 to Ksh. 15,000.00 in May 2013 (see pages 45 to 50 of the



- Respondent's bundle of documents dated 3rd December 2018). It also tendered in evidence [Legal Notice No. 197 of 2013](#) which shows that the minimum salary, inclusive of house allowance, for drivers of light vans in Nairobi was adjusted to Ksh. 13,201.00 from May 2013.
100. Having regard to the minimum wage that was set by the aforesaid Wage Order, it is apparent that the Claimant was earning more than the minimum wage. As such, his contention that he was paid less than the minimum wage for the year 2013 is unmerited.
 101. Both parties produced pay slips for some months in 2014. They show that the Claimant's salary was Ksh. 15,200.00 per month.
 102. The Respondent further produced the Claimant's pay slips for some months in 2015. They show that he continued to earn Ksh. 15,200.00 per month.
 103. The Respondent further produced [Legal Notice No. 117 of 2015](#) vide which the Wage Order for 2015 was published. The instrument shows that drivers of light vans in Nairobi were to earn a minimum wage of Ksh. 14,785.70. As such, at Ksh. 15,200.00, the Claimant was earning more than the minimum wage for the years 2014 and 2015.
 104. For the avoidance of doubt, the Respondent tendered in evidence documents to show that the vehicles which it had assigned to the Claimant were all light vans: Toyota Hiace and Nissan Urvan (see pages 10 to 21 of the Respondent's bundle dated 18th October 2023). As such, there is no doubt in the court's mind that the Claimant was driving light vans and that the Respondent correctly determined his wage band as per the various Wage Orders referred to above.
 105. Having regard to the foregoing, it is apparent that apart from the underpayments of Ksh. 2,520.00 in 2009, the Respondent did not underpay the Claimant for the rest of the time that the parties worked together. Accordingly, the court finds as such.
 106. The Claimant has also claimed for overtime pay. However, a perusal of the amended Statement of Claim dated 9th December 2022 demonstrates that this claim was not pleaded. As such, it cannot be the subject of litigation since parties are bound by their pleadings and are not, as a general rule, entitled to lead evidence on a matter which is not founded on the pleadings (*Mwavula v Waweru t/a Antique Auctioneers Agencies & another* (Civil Appeal E374 of 2023) [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling)). As such, the claim for overtime pay which only featured in evidence but not in the amended Statement of Claim is rejected.
 107. In their final submissions, counsel for the Claimant also sought to claim unremitted NSSF dues. However, this claim does not feature anywhere in the amended Statement of Claim dated 9th December 2022 following the court ruling of 23rd November 2022 which excluded it on account of limitation of time. As such, the court rejects the attempts to re-introduce the claim through the Claimant's final submissions.
 108. The Claimant prays for salary for the month of May 2015. During the testimony of the Respondent's witness, he confirmed that this amount was not paid to the Claimant because he did not collect his final pay cheque. As such, the Claimant is entitled to salary for the month of May 2015 in the sum of Ksh. 15,200.00. Accordingly, the court grants him the prayer for salary for May 2015 in the sum of Ksh. 15,200.00.
 109. The award to the Claimant is subject to the applicable statutory deductions.
 110. The amounts which have been awarded to the Claimant attract interest at court rates from the date of institution of this claim.



111. Since the Claimant has succeeded in respect of a number of issues, the court grants him costs of the case.

Summary of Findings and Award

112. After evaluating the pleadings, evidence, submissions by the parties and the applicable law, the court makes the following findings and attendant orders:-

- a. The court declines to strike out the amended Statement of Claim on account of the instrument having been filed marginally late by a period of two (2) days.
- b. The court finds that the employment relationship between the parties was unfairly terminated on account of attainment of retirement age.
- c. The court declines to grant the Claimant's prayer for salary for the unexpired term of his contract of service.
- d. The court awards the Claimant compensation for the unfair termination of his contract of service which is equivalent to his monthly salary for five (5) months, that is to say, Ksh. 75,921.50.
- e. The court declines to grant the claim for pay in lieu of notice to terminate the contract of service.
- f. The court declines to grant the claim for pay for work done during public holidays.
- g. The court grants the Claimant commutation of fourty seven (47) accrued leave days in the sum of Ksh. 23,782.47.
- h. The court grants the Claimant the sum of Ksh. 2,520.00 to cover underpayment of his salary during the year 2009.
- i. The court declines the claim for overtime pay.
- j. The court declines the claim for remittance of unpaid NSSF dues.
- k. The court awards the prayer for unpaid salary for the month of May 2015 in the sum of Ksh. 15,200.00.
- l. The award to the Claimant is subject to the applicable statutory deductions.
- m. The court orders that the amounts awarded to the Claimant shall attract interest at court rates from the date of institution of this claim.
- n. The court awards the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JUNE, 2025

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order



In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

