



**Nayah v Bhayko Distributors Ltd (Appeal E028 of 2023)
[2025] KEELRC 1913 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E028 OF 2023
MA ONYANGO, J
JUNE 27, 2025**

BETWEEN

JACKTON OTIENO NAYAH APPELLANT

AND

BHAYKO DISTRIBUTORS LTD RESPONDENT

*(Being an Appeal from the Judgment of Hon. P.N Areri dated
28th September 2023 in Eldoret CMELRC NO. 46 OF 2018)*

JUDGMENT

1. The Appellant herein was the Claimant in Eldoret CMELRC No. 46 of 2018 wherein he had sued the Respondent vide an Amended Statement of Claim dated 5th March 2020 seeking compensation and terminal dues for alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 28th September 2023 in which the trial Magistrate concluded:

“In the end and for the reasons I have stated hereinabove I will dismiss and/or strike out the claim herein with costs to the respondent”.
3. The Appellant was dissatisfied with the said judgement and instituted the instant appeal vide the Memorandum of Appeal dated 26th October 2023 on the following grounds of appeal:
 - i. That the learned trial Magistrate erred in fact and in law in completely disregarding the evidence on record regarding the issue of unlawful termination of the Appellant.
 - ii. That the learned Magistrate erred in fact and in law by raising an unpleaded issue, that of the absence of court fee payment receipts from the records, and deciding the case based on that



issue without calling upon the Appellant to address it, and hence condemned the Appellant unheard

- iii. That in any event, the absence of court fee payment receipts from the court record is an administrative lapse that can only be explained by staff in the court registry and not a litigant, in this case, the Appellant.
 - iv. That having raised a set of issues for determination, the learned magistrate erred in fact and in law by proceeding to disregard these very issues in its determination of the matter.
 - v. That the learned magistrate erred in fact and in law by determining the matter in a perfunctory manner without addressing the issues raised by the Appellant.
 - vi. That the learned magistrate erred in fact and in law by failing to appreciate that the Appellant had proven his case to the required standard
4. Consequently, the Appellant prays that the Appeal be allowed and the judgment of the trial magistrate be set aside and/or varied and be substituted with an order allowing the Appellant's Claim against the Respondent.
 5. The appeal was disposed of by way of written submissions pursuant to the directions of the court issued on 16th October 2024. The Appellant filed his written submissions on 2nd December 2024. I have perused the physical court record and the E-filing platform and did not find submissions for the Respondent.

Analysis

6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, *Selle & Another v Associated Motor Boat Co. Ltd & Another* [1968] EA 123, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
7. Vide his Amended Statement of Claim dated 5th March 2020, the Claimant [now the Appellant] averred that he was employed by the Respondent on 1st February 2012 as a driver, earning a salary of Kshs 20,816 per month.
8. The Appellant contends that on 4th July 2018, the Respondent's director, without notice, and without any provocation chased the Appellant out of the Respondent's premises and then instructed security guards to never allow the Claimant back.
9. The Appellant maintained that during the course of his employment with the Respondent he was underpaid, did not proceed on leave and he worked odd hours beyond the time stipulated in the employment contract without any compensation. The Appellant further averred that he worked on Sundays and Public holidays continuously through the entire period of employment without any payment for overtime or extra hours worked.
10. Owing to the alleged unfair and illegal termination of his employment, the Appellant sought to be awarded his terminal dues by the Respondent, which he tabulated as hereunder:
 - i. Salary in lieu of notice Kshs 29,595.70
 - ii. Service pay Kshs. 89,090
 - iii. Leave earned but not taken Kshs. 106,459.80



- iv. 6 months unpaid salary Kshs. 177,574.20
 - v. Underpaid salary for February 2012–June 2018 Kshs. 364,611.60
 - vi. Refund for accommodation and night-outs Kshs. 1,386,000
 - vii. Unpaid house allowance Kshs 243,497.20
 - viii. Unpaid holiday claim Kshs 99,952.70
 - ix. Unpaid overtime Kshs 261,590.05
 - x. Unpaid off-days claim Kshs 563,581.40
11. The Appellant prayed for the following reliefs against Respondent:
- i. A declaration that the termination of the Claimant’s employment was unfair and unlawful
 - ii. A declaration that the totality of the Respondent’s conduct during the duration of the Claimant’s employment was a violation of Article 41[1] and [2][a] and [b] of the Constitution as well as sections 18, 26, 27 and 28 of the Employment Act, in relation to the Claimant.
 - iii. Compensation for sums set out in paragraph 10 above
 - iv. General and aggravated damages for: -
 - a. Breach of the Constitutional right to fair and reasonable working conditions
 - b. Breach of statutory duty relating to annual leave and reasonable working conditions
 - c. Deliberate and egregious harassment and intimidation of the Claimant
 - v. Costs of the claim and interest on [iii] and [iv] above at court rates from the date of filing suit
 - vi. Any other relief that the Honorable Court may deem fit and just to grant
12. The Respondent on its part filed a Statement of Response dated 9th November 2018 denying the averments made by the Appellant in his Statement of Claim. It was the Respondent’s case that the Appellant while in the course of employment developed a habit of reporting to work late and leaving the Respondent’s vehicle unattended which action affected the Respondent’s business.
13. The Respondent contended that the Claimant had a habit of siphoning fuel from the Respondent’s vehicle making transportation of customer’s delivery difficult and as a result, the Respondent lost clients due to the delay in delivery of customers’ orders.
14. The Respondent denied terminating the Claimant and averred that the Claimant absconded duty after stealing Kshs. 31,593 from the Respondent, money which he was given by a customer to remit to the Respondent for goods supplied to the customer. On this basis, the Respondent contended that it would not have been possible for it to comply with the provisions of sections 36 and 41 of the Employment Act since it did not terminate the Claimant’s employment as the Claimant absconded work.
15. The Respondent thus maintained that the Claimant was not entitled to compensation for unlawful and unfair termination as he was never terminated from employment.



16. The Respondent urged the court to dismiss the Claimant's claim with costs.

The Evidence adduced

17. At trial the Appellant testified as CW1 and adopted his witness statement recorded on 19th September 2018 as his evidence in chief.
18. In his testimony, the Appellant stated he started working for the Respondent on 1st February 2012 as a driver until 4th July 2018 when his services were terminated. The Appellant stated that he got bereaved in June 2018 and was given some days off by the Respondent's director Mr. Ashit Kotak.
19. He averred that he reported to work on 3rd July 2018 and performed his duties for the day. That on 4th July 2018, Mr. Ashit told him to leave the premises and wait until he was called back. It was his testimony that he was never served with a show cause letter and neither was he invited to a disciplinary hearing. The Appellant averred that he was not paid salary for 6 months' which he claimed. He also averred that although the employment contract stipulated that working hours was between 8:30am and 5pm, he worked for the Respondent from between 7am to 11pm throughout the week. He also stated he never went on leave nor was he given off days during holidays.
20. The Appellant denied absconding duty after stealing from Mr. Gitonga as alleged by the Respondent. He produced the statement of Mers Bakers which showed that on 7th July 2018 the invoice had been paid yet it was claimed that he stole the money.
21. On cross-examination, the Appellant stated that Mr. Ashit Kotak gave him an appointment letter in February 2012. It was also his evidence that in July 2018, he worked for only one day.
22. On re-examination, the Appellant maintained that he was not paid his salaries from January to June 2018.
23. The Appellant called Joel Ouma Ojwang who testified as CW2. The Appellant's witness stated that he worked for the Respondent with the Appellant. That on 4th July 2018 the Appellant was told by Mr. Ashit to surrender the lorry keys and when the Appellant resisted, police were called. He stated that the Respondent's director chased the Appellant from work and handed over the keys of the lorry that had been assigned to the Appellant to CW2.
24. On cross-examination, CW2 reiterated that he worked with the Appellant and that he was also dismissed from employment by the Respondent on grounds that he had left a customer before confirming that payment had been made through Mpesa.
25. Rashid Kotut, the Respondent's witness testified as RW1 in furtherance of the Respondent's case. He introduced himself as the Respondent's director and adopted his witness statement recorded on 5th March 2022 as his evidence in chief. RW1 contended that the Appellant was paid his monthly salary in full. He also stated that the Appellant was not required to work overtime and when he delayed as a result of lorry breakdown, he would be paid the overtime instantly. He produced Mpesa statement as Exh 3 in support of this averment. On the claim for leave dues, RW1 stated that the Appellant had no claim for unpaid leave as he was paid his leave dues in 2016 and 2017.
26. It was RW1's testimony that in July 2018, the Appellant was asked to deliver goods but he did not remit the payment to the Respondent. He stated that vide a letter dated 9th July 2018, the Respondent wrote to the customer who replied vide a letter dated 10th July 2018 stating that the payment for the delivered goods was made in cash to the Appellant.



27. The Respondent's witness also denied that the Appellant was employed by the Respondent in 2012 and averred that the employment contract produced as Pexb 1 was a forgery. RW1 stated that the domain for his email address was registered in 2014 and that the address indicated therein was issued in 2016 after the company moved from Kapsabet to Eldoret.
28. RW1 maintained that the Appellant absconded duty after he was asked to reconcile his accounts.
29. On cross-examination, RW1 confirmed that the Appellant was the Respondent's employee. He stated that the Appellant took Kshs. 31,595 from Mers shop after delivering goods on 7th July 2018 but did not remit the same to the Respondent. RW1 admitted that the invoice sent to customers had instructions that customers should not pay the driver in cash.
30. After hearing the parties, the trial court delivered its judgment on 28th September 2023 which read in part as follows: -

“In the instant case, the Claimant did not resign and has not resigned to date. He was not discharged. The Claimant admitted that he was working for someone other than the Respondent. It is possible that the claimant knowing that he had secured employment with that other person stole the money alleged and ran away. That possibility was not other than the mere denial given, rebutted or controverted by the evidence adduced by the claimant and for that reason the issue of constructive dismissal is not applicable. From the conduct of the claimant I will agree that the claimant was out to unfairly get money from the respondent and taking into consideration all the facts of this case, I find the claims by the claimant are not proved and remain mere allegations. The next issue is whether the claimant paid the requisite, court fees to commence on his statement of claim or the amended statement of claim. I have perused the court record and find no evidence of payment of court fees on the Statement of claim or the amended statement of claim.

In *Mombasa Cement Ltd v Speaker, National Assembly & Another* [2018] eKLR the Court was faced with similar dilemma of non-payment of requisite court fees and its consequences. Hon. Justice J.M Mativo aptly held: -

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.”

Guided by the *Mombasa Cement* case supra I find the cause herein is incompetent and a non-starter. The same ought to have been struck out at the first instance.

In the end and for the reasons I have stated hereinabove I will dismiss and/or strike out the claim herein with costs to the respondent.”

31. It is the said judgment that is now the subject of this appeal.



Appellant's submissions

32. The Appellant submitted that the court erred as it completely ignored the evidence tendered by the Appellant, his pleadings as well as the testimony of his witness. According to the Appellant, he pleaded and testified that on 4th July 2018, the Respondent's director, Mr. Ashit Kotak, without notice and without any provocation or reason, literally chased him out of the Respondent's premises and then instructed security guards never to allow him back. The Appellant submitted that this averment was supported by his witness, CW2 who confirmed that the Appellant was indeed chased from the Respondent's premises.
33. It is the Appellant's submission that the Respondent, having failed to prove that the Respondent's actions were sanctioned by Section 43 of the Act, it acted unfairly in dismissing the Appellant summarily. Further, the Appellant submitted that summarily dismissal without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the *Employment Act*. The Appellant cited the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited, [2013] eKLR in support of this position.
34. As to the reliefs sought in his claim, the Appellant submitted that the trial court completely ignored his pleadings and evidence on the claims for under payments, unpaid leave, unpaid house allowance, unpaid holidays, overtime and off days worked. The Appellant submitted that he is entitled to these claims under the law. He urged the court to review the evidence and the pleadings and determine that all his claims were unpaid and are hence due.
35. On the issue whether the court was justified in striking out the claim on the ground that there was no receipt for payment of court filing fees for the Claim and Amended Claim, the Appellant has submitted that the issue was never a part of any party's pleadings and that none of the parties addressed it. The Appellant submitted that striking out the suit on this ground after parties had gone through the hearing that took 5 years was unfair and amounted to condemning the Appellant unheard, noting that the Appellant was not in charge of the court registry. On this basis, the Appellant submitted that while payment of filing fees signals the assumption of jurisdiction over a claim, the absence of receipts of such payments is not necessarily absence of payment.
36. The Appellant submitted that while the trial court quoted paragraph 27 of the decision in Mombasa Cement v Speaker, National Assembly case to justify his decision, he omitted the part that speaks to the court's power to exercise discretion. It is the Appellant's submission that Mativo J in the said decision did not simply strike out the petition in the above case, but first allowed the party to remedy the situation.
37. The Appellant submitted that the suit having been in the judicial pipeline for over 5 years, where the parties had already testified and where the Appellant was never heard on the issue of presence or absence of the receipt for payment of filing fees, the trial court ought to have exercised caution by first directing that the matter be addressed by the Appellant and thereafter grant an opportunity to remedy any lapse the payment was found not to have been made.
38. The Appellant urged the court to allow the Appeal.

Respondent's Submissions

39. At the time of writing this judgment the submissions of the Respondent had not been filed. On 16th October, 2024 directions were issued that the appeal be disposed off by way of written submissions. The Appellant was given 21 days to file and the Respondent was to file within 21 days of service.



40. When the appeal came up for mention on 2nd December, 2024 for purposes of fixing judgment date, counsel for the Appellant confirmed that he had filed submissions but had not served the Respondent. The Respondent was granted a further 21 days to file. On 3rd February, 2025 the Respondent requested for and was granted a final 7 days to file its submissions. The 7 days lapsed on 10th February, 2025 without any submissions having been filed by the Respondent.

Analysis and determination

41. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the supplementary Record of Appeal as well as the submissions on record, I find that the issues that fall for my determination are: -
- i. Whether the decision by the trial court to strike out the Appellant's suit was anchored in law,
 - ii. Whether the trial court considered the pleadings and evidence adduced before it in reaching its decision,
 - iii. What reliefs should issue.
42. On the first issue, as can be deduced from the portion of judgment of the trial court reproduced at paragraph 30 above, the basis for the trial court's decision to strike out the Claimant's suit is that the trial court did not find evidence of payment of court fees on the Statement of Claim and Amended Statement of Claim.
43. In his submission on Appeal, the Appellant opined that the issue of failure to pay fees can only be dealt with administratively through the Registrar or Court Administrator. According to the Appellant, section 96 of the Civil Procedure Act contemplates that a party ought to be granted an opportunity to address the court and confirm or disprove that court fees were not paid and that if a lapse is found, the court has a discretion to allow the lapse to be remedied.
44. Section 96 of the Civil Procedure Act provides for power to power to make up deficiency of court fees. It reads: -
- “Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”
45. In the case cited by the Appellant of *Mombasa Cement Limited v Speaker, National Assembly & another* [2018] eKLR, the court held as follow in regards to failure to pay court fees:-
- “The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit in competent and strike it off as I am compelled to in this case.”
46. It is clear that the circumstances of that case were very different from the present one. In this case, there is no indication that the issue whether court fees had been paid was ever raised in the proceedings. In



addition, there is no evidence that the Appellant was given an opportunity to address the said issue before the suit was struck out.

47. It is therefore my considered view that the trial court erred in striking out the suit on the basis of an issue that was never raised by any of the parties and which the Appellant was not given an opportunity to address. Further, the issues for determination as framed by the trial court did not include the question of nonpayment of court fees. The trial court's finding on the issue of non-payment of court fees by the Appellant was therefore not an issue for determination by the court. If the court noted that there was no court receipt in the file, the Appellant should have been called upon to respond to the issue before the court could make a determination on the same. The court thus erred in considering the issue of court fees and further in striking out the suit on this ground.
48. On the second issue, in the impugned judgment of the trial court at page 171-172 of the Record of Appeal, the trial court held as follows: -

“There is no evidence to show the claimant was not paid any of his monthly salary for the period of his employment or there was under payment, there is nothing to show the claimant worked overtime during Sundays and/or during public holidays. It is trite law that as a general rule, documents must be proved by primary evidence, except where primary evidence may not be obtained without unreasonable delay, and secondary evidence may be adduced to prove the existence of the original. Although the claimant alleged to have been sacked there is nothing to show his services were terminated. On the flip side the claimant wants the court to infer constructive dismissal from employment.”

[Emphasis added]

49. I have analyzed the pleadings and the evidence tendered in court and did not find that the Appellant pleaded constructive dismissal. The trial court therefore erred in addressing the issue of constructive dismissal and making a finding on the same when the issue was never raised by any of the parties.
50. In his testimony at trial, the Appellant averred that the Respondent's director verbally chased him away from work on 7th June 2018. The Appellant's witness, CW2 in his testimony also told the trial court that the Respondent's director chased the Appellant from the Respondent's premises and that CW2 was assigned the lorry that was initially being driven by the Appellant. In its defence, the Respondent contended that the Appellant absconded duty after he was asked to reconcile his accounts. According to the Respondent, the Appellant on 7th July 2018 made a delivery to Mers Shop and was paid Kshs 31,595 in cash which amount was to be remitted to the Respondent but which the Appellant failed to remit opted to abscond duty.
51. By dint of Section 44[4] [a] of the *Employment Act*, absconding of duty by an employee without permission or lawful cause amounts to gross misconduct for which the employer may summarily dismiss the employee.
52. It is now trite that an employer alleging desertion or absconding of duty by an employee must always demonstrate the action he took when the employee failed to turn up at the place appointed for performance of his duties. The Respondent herein did not tender evidence to show that it made efforts to reach out to the Appellant after he allegedly absconded duty. Further, the Respondent did not adduce any evidence that it asked the Appellant to reconcile his accounts on 8th July 2018.
53. In view of the evidence on record, and on a balance of probabilities, I find no evidence to support the allegation by the Respondent in its defence that the Appellant absconded duty after he was asked



to reconcile his accounts on 8th July 2018 and hold that the Appellant's employment was unfairly terminated by the Respondent.

54. Before I address the issue regarding the reliefs that should issue, it is imperative that I deal with the issue of the period which the Appellant was engaged by the Respondent as this issue arose in the pleadings and at the hearing before the trial court.
55. The Appellant pleaded that he worked for the Respondent from 1st February 2012 until 4th July 2018 when he was unlawfully dismissed from employment. In support of his claim that he was employed in February 2012, the Appellant produced an employment contract dated 1st February 2012 as Exb 1. The Respondent denied that it engaged the Appellant in the years 2012, 2013 and 2014, and contended that the Employment contract produced by the Appellant was forged as the Respondent was not in operation at that time. In support of this position, the Respondent's witness produced the postbox history and receipt for domain registration showing that the postal address and the email address in the Employment contract were not in existence by then.
56. I have looked at the witness statement of Ashit Haridas Kotak at page 45 of the Record of Appeal and noted that the said Ashit stated that the Appellant was employed by the Respondent from February 2012 until June 2015 when he was released and that he was re-engaged on 15th November 2016.
57. The Respondent produced unified payrolls at pages 75 to 111 of the Record of Appeal. I have noted from the same that the Appellant was not in the payroll from July to December, 2015 but was in the payroll for the rest of the time he states he was at work. This was confirmed by DW1 and DW2 both of whom testified that the Appellant worked from 2012 to May, 2015, then resumed in November, 2015 to July 2018. From the payrolls, the Appellant was in employment from 2012 to July, 2018 with a break of 5 months from July to November, 2015. There is however no evidence that the break constituted a termination of employment and a re-engagement.
58. In his Amended Statement of Claim, the Appellant prayed for various reliefs, which I address as hereunder in separate heads.
- i. A declaration that the termination of the Claimant's employment was unfair and unlawful.
In view of the finding above that the Appellant was unfairly terminated from employment, I make declaration that the termination of the Appellant was unfair and therefore unlawful.
 - ii. A declaration that the totality of the Respondent's conduct during the duration of the Claimant's employment was violation of Article 41[1] and [2][a] and [b] of the Constitution as well as sections 18,26,27 and 28 of the Employment Act, in relation to the Claimant.
I decline to make this declaration as no constitutional violations were proved.
 - iii. Compensation for unlawful, un-procedural and unfair termination from employment as prayed for in the statement of claim.
In his claim, the Appellant tabulated several reliefs which he claimed was owed to him by the Respondent. These reliefs are addressed separately as hereunder: -
 - a. Salary in lieu of notice
Having found that the termination of the Appellant's employment was unfair, he is entitled to pay in lieu of notice. I award the Appellant Kshs 23,690 under this head being the basic salary plus house allowance.
 - b. Service pay



From the Appellant's pay slip for May 2018, annexed to the Respondent's list of documents, it is clear that the Claimant was a member of NSSF and deductions were made in this respect. He is therefore not entitled to this relief and the prayer is declined.

c. Leave earned but not taken

Section 74[f] of the *Employment Act* obligates an employer to keep records of each employee's leave entitlement, days taken and days due as specified in Section 28 of the Act. No such records were produced by the Respondent, being the employer. The Appellant was, pursuant to Section 28[1] [a] of the *Employment Act*, entitled to a minimum of 21 working days' leave with full pay for each completed year of service. There being no evidence by the Respondent that the Appellant either took the leave days or was paid in lieu thereof, the Appellant is entitled to 21 days' pay for each completed year of service from the time he resumed duty after the break in 2015 being 2016, 2017 and January to June, 2018, being payment for accrued leave of 30 months at 1.75 days per month being 52.5 days not taken. I award the Appellant Kshs. 47,836 in this regard.

d. 6 month's unpaid salary

No evidence was tendered in support of this position. I decline to make any awards under this head

e. Underpaid salary for February 2012-June 2018 and Unpaid house allowance

From the pay slip annexed to the Respondent documents, there is no provision for house allowance.

Section 31[1] of the *Employment Act* provides as follows;

"An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation."

Under the Regulation of Wages [General] [Amendment] Order 2012, 2013, 2014, 2015, 2016, 2017 and 2018 that are relevant for the purpose of this claim, the monthly wages for drivers were as follows –

Period Basic Pay H/A C/Pay

1st May 2012 13,305.40 1995.81 15653.4

1st May 2013 15,259.35 2288.9 15653.4

1st May 2014 15,259.35 2288.9 17952.2

1st May 2015 17,090.50 2563.6 20,107

1st May 2016 17,090.50 2563.6 20,107

1st May 2017 20,166.80 3025 23,726

1st May 2018 21,175.15 3176.30 24352

**** H/A - House Allowance



C/Pay- Consolidated Pay [Basic plus house allowance]

The Appellant in his claim averred that he was employed by the Respondent on 1st February 2012 as a driver earning a monthly salary of Kshs 20,600. Based on the wage orders above, the Appellant was even underpaid from 1st May, 2017 to June, 2018 as follows:

1st May, 2017 to 30th April, 2018

Kshs. $3126 \times 12 = 37512$

1st May 2018 -30th June, 2018 Kshs. $3752 \times 2 = 7504$

Total underpayments Kshs. 45,016.

The underpayment is inclusive of house allowance.

f. Unpaid holiday claim

On the claim of holiday pay, the Respondent did not tender any evidence to show that the Claimant did not work during holidays nor that he was compensated when he worked on holidays.

Under the Public Holiday Act, there are 11 holidays in which the Appellant may have qualified for. I find that the Appellant is indeed entitled to the payment of 11 days = $11/30 \times \text{Kshs } 20,600 \times 30$ months, a total of 26 days. Public holidays are according to rule 6 of the Regulation of Wages [General] Order, payable at double the normal rate of pay. For the 26 days the Appellant is awarded totals to Kshs 42,350.30 which I hereby award.

g. Refund for accommodation and night-outs

The Appellant did not lead evidence as to what dates he claims and how much was due to him under this head. This prayer is declined.

h. Unpaid overtime

In his testimony the Appellant stated that he used to work for the Respondent from 7.30 am to 11pm. The Respondent on its part produced Mpesa statements showing that the Appellant was paid other monies via Mpesa other than his salary. I am inclined to believe that the same was for overtime as stated by the Respondent and decline to award the Appellant under this head.

i. Unpaid off day claim

This prayer cannot issue as the Appellant did not state in his evidence the period which he alleges not to have compensated for unpaid offs.

iv. General and aggravated damages

Section 49 of the *Employment Act* only provides for compensation for unfair termination which the Claimant has already been awarded. Besides, there is no legal or contractual basis for granting this relief in the circumstances of this suit. [See *Rookes v Barnard* AC 1129. Lord Devlin identified three categories where exemplary damages could be awarded: 1] oppressive, arbitrary, or unconstitutional action by government servants; 2] where the defendant's conduct has been calculated to make a profit which may exceed the



compensation payable; and 3] where specific statutory provisions authorize their award.]

59. Consequently, the judgment of the trial court striking out the Appellant's suit is set aside and substituted with the following:

- i. A declaration be and is hereby issued that the termination of the Claimant's employment was unfair and unlawful.
- ii. The Appellant is awarded: -
 - a. Salary in lieu of notice Kshs 23,690
 - b. Leave accrued but not taken Kshs 47,836
 - c. Underpayments and Unpaid house allowance Kshs 45,016
 - d. Unpaid holiday Kshs 42,350.30

60. The Appellant is awarded costs of the Appeal and costs in the lower court.

61. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF JUNE 2025

MAUREEN ONYANGO

JUDGE

