Wareng High School v Sanga (Appeal E003 of 2023) [2025] KEELRC 1968 (KLR) (27 June 2025) (Judgment) (with dissent - MA Onyango, J)

Neutral citation: [2025] KEELRC 1968 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

APPEAL E003 OF 2023

MA ONYANGO, J

JUNE 27, 2025

BETWEEN

WARENG HIGH SCHOOL .... APPELLANT

AND

JONAH KIMUTAI SANGA .... RESPONDENT

(Being an appeal against the Judgment of Honourable Naomi Wairimu (Senior Principle Magistrate) delivered on 22nd December 2022 in Chief Magistrates Court at Eldoret in CMELRC No. 59 of 2018)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 59 of 2018 wherein the Respondent sued the Appellant vide a Statement of Claim dated 27th August 2018 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 22nd December, 2022 in favour of the Claimant awarding him Kshs. 3,581,480 on account of pay in lieu of notice, pay in lieu of leave, compensation for unfair termination of employment, salary for March, 2017, outstanding overtime and salary underpayments. The Claimant was also awarded costs of the suit and interest from date of filing suit until payment in full.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 2nd October, 2023 on the following grounds of appeal:
    a. The learned Magistrate erred in law in solely relying on the respondent's evidence and submissions' and failing to consider the appellant's submissions in arriving at her findings against the appellant.

b. The learned trial magistrate erred in law and fact in holding that the appellant's termination of the claimant's services was discriminative, malicious, unlawful, unfair, and unprocedural without any evidence to that effect.

c. The learned trial magistrate erred in fact and law by failing to give a well reasoned judgment on each item pleaded and the evidence adduced by the appellant.

d. The learned trial magistrate erred in fact and law by failing to dismiss the respondent's case against the Appellant with costs.

e. The learned trial magistrate erred in law and fact in failing to find that the Respondent did not prove his case against the appellant.

f. The learned trial magistrate erred in law and fact in awarding damages against the appellant.

g. The learned trial magistrate erred in law and fact in awarding damages that were inordinately high in the circumstances and failing to appreciate the evidence by the appellant thereby leading to a miscarriage of justice.

h. The learned trial magistrate erred in law and fact in using the wrong principles in assessing the costs.

i. The learned trial magistrate erred in law and in fact to find that the Appellant's were not in any way liable for unlawful and unfair termination of the claimant's services and therefore ought to have dismissed the Respondent's case against the appellant with costs.

4. The Appellant prays for the following orders:

   a. That this Appeal be allowed with costs.

   b. That the trial magistrate's judgment against the appellant be set aside.

   c. An order be made dismissing the Respondents case against the appellant with costs.

   d. This Honourable court makes such and further orders as it deems fit and just to meeting the ends of justice.

5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 15th November, 2023 while the Respondent's submissions are dated 13th December, 2023.

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 Statement of Claim dated 27th August 2018, the Claimant (now the Respondent) averred that he was employed by the Appellant a registered public secondary school in Uasin Gishu, as chef on 5th January, 2010. That the contract was oral and the employment terms were on permanent basis. That at the time of termination of his employment he was earning a gross salary of Kshs. 8,500.

8. The Claimant averred that he served the Respondent with loyalty, diligence and commitment without any warning until 3rd April, 2017 when the Respondent, without any lawful reason or justification, orally terminated his employment by denying him entry into the institution's premises.

9. It was the Claimant's case that he reported to work as usual on 3rd April, 2017 and on arrival at the school gate the security officer manning the gate told him that he had instructions from the principal not to allow the Claimant access to the premises. The Claimant averred that he immediately called the principal who refused to take his calls.

10. The Claimant averred that he went home and reported back to the school the following day but was again denied entry by the security officer at the gate. He avers that he remained at the gate until about lunch hour when he was informed by the security officer to vacate and never to go back.

11. The Claimant avers that he called the school principal once more but was abused and told his services were no longer required by the school.

12. The Respondent averred that the termination was unfair, unprocedural and unlawful. That the dismissal violated the provisions of section 44(4), 45(2) and 43 of the *Employment Act*.

13. The Claimant contended that owing to the alleged unfair termination of his employment, he was entitled to terminal benefits and prayed for the following reliefs:

    a. A Declaration that the termination of claimants' employment on account of negligence was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;

    b. the terminal dues as tabulated herein below

    c. a maximum compensation as per Section 49 (c) of the *Employment Act*, 2007;

    d. a certificate of Service as per Section 51 of the *Employment Act*;

    e. costs and interest of this suit.

    f. Any other awards as the honourable court deems fit to grant in the circumstances of this case.

14. The Appellant (Respondent in the trial court) who was represented by the Office of the Attorney General filed a Reply to the Statement of Claim dated 10th June, 2019 denying that the Respondent was its employed permanently by an oral contract by the Respondent as alleged in the Statement of Claim. The Respondent further denied that it orally terminated the Respondent's employment as alleged. It further denied that the process of termination was unfair as alleged by the Respondent.

15. It was the Appellant's case that due procedure was followed in terminating the Respondent's employment as he was issued with a several letters and notices, invited to show cause and to defend himself to the Board of Management of the Respondent but adamantly refused. The Respondent further averred that it lodged a complaint against the Respondent at Eldoret Police Station wherein investigations were commenced. That the Respondent was further duly informed of the Respondent's resolution to terminate his employment following his failure to attend the board meeting and defend himself.

16. The Appellant prayed that the suit be dismissed with costs.

Evidence

17. The suit was heard on 9th April, 2019 in the absence of the Respondent but the proceedings were set aside by consent of the parties. The suit was again heard on 15th February, 2022 and on 27th September, 2022. The Claimant testified on his own behalf while the Appellant called 3 witnesses being the

Principal Mr. Julius Kimatei who testified as DW1, Mr. Sammy Kenei, the Bursar who testified as DW2 and Mr. David Sichei Kae, a guard at Wareng High School who testified as DW3.

18. The Respondent adopted his witness statement and testified that he was employed by the Appellant on 5th January, 2010 as a chef. He was not paid in lieu of notice. He did not get the letters from the Appellant. He stated that the address used P.O. Box 5210 belonged to the school which his children attended. He testified that Julius Kimatei was the principal of the school.

19. He testified that on 29th March, 2017 he left the school at 2.30 pm that he was never arrested and charged or called for disciplinary hearing by the school for stealing food. He stated that he never wore a red hat at the school.

20. On cross examination the Respondent stated that he was never issued with a letter of employment, was never confirmed in employment. He stated he was dismissed on 3rd April, 2017. That he was at work on 29th March, 2017 and left at about 7.10 pm because his brother was hit by a motor vehicle so he did not know what happened at about 7.30 pm. That he was not aware some property was stolen on that day and never heard about the theft. He stated that Paul Kirongo was a watchman at the school.

21. The Respondent stated that he did not know why he was denied access to the school on 3rd April, 2017. He stated he never received the show cause letter. That the address on the letter was the one he gave to the school.

22. On re-examination he stated that he was in school between 7 and 7.30 pm working, that he gave the school his postal address and phone number and the school administration knew his home.

23. DW1, Julius Kamatei testified that he was the principal of the Wareng High School. He adopted his witness statement dated 29th march, 2019. He testified that he made a report to the police on 30th March, 2017 and recorded statements. That 3 to 4 days after the Respondent failed to report to school he wrote to him a show cause letter dated 1st April, 2017. There was no response to the show cause letter so he wrote a letter of interdiction dated 13th April, 2017. A meeting of the Board was called on 18th April, 2017 and the Respondent was invited for disciplinary hearing vide letter dated 11th August, 2017. Another board meeting was held on 25th August 2017 and the board felt that since the Respondent had been given a chance but did not show up he should be dismissed. A dismissal letter dated 28th August 2017was issued to the Respondent.

24. DW1 stated that the Respondent's working hours were from 6 am to 5 pm and there was no overtime. That the school had 4 cooks with none of them having special arrangements. That the staff were given 21 days leave during school holidays and they were paid salary during leave.

25. Under cross examination DW1 stated he did not have the Respondent's file in court, that the letters were sent through the post office but he did not have the certificate of posting in court, that the Respondent was invited to two meetings held in August, 2017.

26. DW1 said that on the material day he was called by the Deputy Head Teacher who had since passed away and DW1 saw the Respondent carrying items out of the school bakery. That it was between 7.15 and 7.30 pm and there were security lights, that students only take meals at lunch time and cooks are supposed to leave between 3 and 5 pm. That there are no occasions when the cooks prepared food past 5 pm. That employees clocked in and out but he had not filed the register in court. He stated he was not sure if the school had the Respondent's telephone number but there was a copy of his id in the school file. He stated he could not recall how much the Respondent was earning but the records were in school. He stated that the Respondent was not paid salary for March, 2017 because of the disciplinary case. He stated that they found the Respondent's cap in school.

27. DW2 testified that he was the school bursar at Wareng High School. He adopted his witness statement dated 29th March, 2019.

28. Under cross examination he stated that he was called by the principal DW1 and saw the Respondent running at around 7.30 pm. He stated that he saw the Respondent's cap, that he was aware the Respondent had been sent a letter for his conduct by the Board. he stated he had the Respondent's phone number and had records of payments to the Respondent. that payments were made through the bank. That the Respondent was not paid for March, 2017.

29. He stated he wrote a statement at the police station, that he worked with the Respondent from 2013 to 2017 and never heard he had stolen.

30. DW3 adopted his witness statement and stated he was a guard at Wareng High School. He stated that on the material date he saw the Respondent in front of him but did not see him stealing. He stated that those who bake bread stay late on that day.

31. Under re-examination DW3 stated that he did not see the Respondent stealing but he saw the cap the Respondent was wearing

32. After the close of the Respondent's case, the trial court delivered its judgment on 22nd December, 2022 favour of the Respondent.

Appellant's submissions

33. The Appellant crystallized the grounds of appeal into the following two issues:

    i. Whether the trial court erred in holding that the Respondent's termination was unlawful, unfair and unprocedural,

    ii. Whether the trial court erred in awarding the remedies as done.

34. The Appellant submitted that this being a first appeal the guiding principles as set out in Musera v Mwechelesi & another [2007] eKLR is to re-asses and re-evaluate the entire evidence tendered before the trial court and arrive at its own conclusions, while taking into consideration the lower court's exercise of discretion.

35. The Appellant submitted that in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR the Court of Appeal held that the standard of proof applicable in employment disputes is on a balance of probabilities and not beyond reasonable doubt, that all an employer has to prove are the reasons it genuinely believed to exist causing it to terminate the employee's services.

36. It submitted that on the first issue the Appellant was required to prove fair procedure and substantive justification.

37. On fair procedure the Appellant submitted that on fair procedure, the court in Lydia Moraa Obara v Tusker Mattresses Limited stated: "In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to rebut the allegations of misconduct, or offer a representation on any grounds that the employer has indicated to be basis for his intention to terminate the employment and bring to the attention of the employer any relevant information before a final decision is taken."

38. On the question of substantive justification the Appellant submitted that section 45 of the *Employment Act* states that no employer shall terminate the employment of an employee unfairly. That the section places the burden on an employer to prove reasons for termination was valid and fair. That

in the case of British Leyland UK Limited v Swift [1981] 1 RLR 91 at 93 Denning MR enunciated the test: Was it reasonable for the employer to dismiss the employee? If no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.

39. The Appellant submitted that in this case the Respondent was employed as a cook and the genesis of the matter began when the Appellant received reports that some school's kitchen staff were stealing food items from the kitchen. Subsequently, on Wednesday 29/03/2017 at around 7.15 pm, the Principal of the Respondent's School received the same report and immediately he contacted the school bursar Mr. Sammy Kemei and linked up with the deputy principal who was still in school. True to their suspicion, they witnessed the Respondent and other staff members moving out the bakery with sacks full of kitchen items.

40. It was submitted that the Respondent in particular while in the process of fleeing, his cap fell off and the chasing party picked it up and positively identified it as belonging to him. Due to the gravity of the occurrence, the principal together with the school bursar reported the matter to Langas Police Station and obtained an 0B No. 48/29/3/2017 which was produced as Defense Exhibit No.2. The Respondent did not report to work from 29/03/2017 and the principal wrote a letter to show cause why he should not be disciplined for absconding duty dated 1.4.2017 and the same was produced as Defense Exhibit No.3.

41. That there was no response from the Respondent and after 14 days the principal wrote an interdiction letter to the Respondent dated 13th April, 2017.

42. It is submitted that the Respondent cannot frustrate the disciplinary proceedings and claim he was unlawfully terminated. That the evidence of DWI shows the Respondent was invited vide a letter dated 11th August, 2017 to appear before the Board of Management of the school for disciplinary hearing on 25th August, 2017 to defend himself but he did not show up. That the invitation letter for disciplinary hearing was produced as Defense Exhibit No. 5. The B.O.M meeting minutes dated 25th August, 2017 was produced as Defense Exhibit 6. It was submitted that the Appellant considered all these factors before making the decision to dismiss the Respondent.

43. The Appellant submitted that the Respondent's dismissal was fair, relying on the decision in Evans Kamadi Misango v Barclays Bank of Kenya Limited where the court stated: -

> " To my mind the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The Halsbury's Laws of England (4th Edition Volume 16) at page 481 expounds this principle as follows: - "In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those fact; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach (the range of reasonable test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; but if it falls outside the band, it is unfair".

44. It was submitted that during cross examination the Respondent confirmed that several letters were sent to the address he had given to the Appellant. That the Respondent's statement in his evidence that he was not served nor receive letters from the Appellant is untrue and this court should not believe his allegations. That the Appellant followed the provisions of section 43 of the *Employment Act* before terminating the Respondent's employment. For emphasis the Appellant relied on the decision in Charles Musungu Odana v Kenya Ports Authority [2019] eKLR, the Court held that: -

> "It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment."

45. The Respondent further relied on the Court of Appeal in Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] where the court stated that justice is a two-way highway and the court must endeavor to render just decisions to employees in much the same way as it must to employers. The Appellant insisted that it followed due process as is evident from the evidence on record.

46. On the remedies the Appellant submitted that the Respondent did not justify the award of Kshs. 195,000 for outstanding overtime pay and Kshs. 1,620,167.80 for overtime dues. The Appellant relied on the decision in Victor Sendeu Omwenga v General Timothy Misiani Orwenyo T/A GMT Services where the court stated that: Likewise, the claim for overtime is dismissed for being exaggerated and lack of documentary evidence in support.

47. On the award for compensation the Appellant submitted that it had reasonable grounds to entertain a genuine belief that the Respondent was guilty of misconduct and there was no justification in awarding inordinately high compensation.

48. On the award of pay in lieu of notice the Appellant submitted that upon absconding duty the Respondent was invited to defend himself and pick his march salary which he did not pick. The Appellant relied on the decision in CMC Aviation Limited v Mohammed Noor [2015] eKLR, where the Court held that despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation.

49. On the claim for underpayment of wages the Appellant submitted that the award of Kshs. 1,545,887.50 was too high, that the Appellant always paid the Respondent as per agreement. That the amount claimed was never proved. The Appellant urged the court to be guided by the decision in the case of Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR where the Court cited the case of D.K. Marete v Teachers Service Commission Cause No. 379 of 2009 and held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, but are meant to redress economic injuries in a proportionate way.

50. The Appellant urged the court to set aside the entire judgment of the trial court and allow the appeal with costs.

The Respondent's submissions

51. The Respondent set out the issues for determination to be:

    i. Whether the record of appeal is incomplete and ought to be struck out,

    ii. Whether the Respondent's services were unlawfully, unfairly and unprocedurally terminated,

    iii. Whether the trial magistrate failed to consider the evidence adduced by the Appellant,

iv. Whether the Respondent proved his case on a balance of probabilities and whether the Respondent is entitled to the reliefs sought in the Statement of Claim.

52. The Respondent submitted that the Appellant filed a record of appeal dated 4th October, 2023 and the appeal was admitted on 25th October, 2023. That on perusal of the record of appeal the first page had an index which did not indicate that the decree formed part of the record and the entire record of appeal did not have a decree of the trial court.

53. It submitted that this being and employment related dispute, the applicable rules of procedure on appeal should be the Employment and Labour Relations Court (Procedure) Rules, 2016, which is silent on the record of appeal requirements. That the applicable rules are therefore the provisions of Order 42 Rule 13(4)(f) the Civil Procedure Rules, 2010 which requires that the judgment and decree appealed from to be part of the record of appeal. The Appellant did not file the decree in the record of appeal neither have they filed in court up to date. The Respondent submitted that the omission of the decree is fatal as has been stated in the following cases: -

> Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR where the court stated that: -
>
> "Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues .....
>
> ....We understand the learned Judges to have been saying that the omission of the mandatory documents from the record, had the effect of rendering the Court incapable of adjudicating upon the issue placed before it on appeal, as certain conditions set by law had not been met. The Court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled.
>
> Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR where the court stated that: -
>
> "Coming back to this appeal, there is no evidence that the appellants ever applied for the decree appealed against, let alone filing it as part of the record of appeal. Without belabouring the point, this failure is fatal to the appeal; sheer failure to comply with the foregoing mandatory statutory and procedural provisions renders this appeal incompetent and of no consequence; it is hereby struck out with costs.

54. It is submitted that from the above cases it is clear that it is fatal not to include a decree in the record of appeal and worse where none is filed before disposal of the suit. That this appeal therefore ought to be dismissed for failure to file a decree appealed against. It is further submitted that the record of appeal is incompetent in that some pages in the record of appeal have been placed to be read from back to front especially from page 64 to 88.

55. On the 2nd issue the Respondent submitted that the law relating to termination of employment is contained in section 41, 43 and 45(2) of the *Employment Act* as summarized in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR where the court stated:

> For termination to pass the fairness test, there must be both substantive and procedural fairness. Substantive justification has to do with establishment of a valid reason for the

termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

56. The Respondent further submitted that Article 41 of *the Constitution* provides for fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

57. The Respondent relied on the decision in Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR where the court reiterated that the employer must act with justice and equity in terminating employment.

58. It was submitted that during the hearing the Respondent denied receipt of the show cause letter and the letter inviting him for disciplinary hearing alleged by the Appellant to have been posted to his last known address. That the Appellant did not attach the certificate of posting.

59. The Respondent submitted that in Nakuru *CA No. 95 of 2017* Edwin Kosgei v Metkei Multi-Purpose Company Limited the court held that there was no proof of posting to show that letters were posted. That section 109 of the *Evidence Act* provides that the burden of proof lies with the person who wishes the court to believe his evidence.

60. It was submitted that the minutes of the committee held on 18th April, 2017 and 25th August 2017 produced by the Appellant should be disregarded for reasons that that the Respondent was never made aware of the meetings and that the Appellant had already decided on the fate of the Respondent.

61. On substantive justification the Respondent submitted that he testified that he arrived in school on 3rd April, 2017 and was stopped by the security guard manning the gate who informed him that the Principal had given instructions that he should not enter the premises. That the reason given by the Appellant for terminating the Respondent's employment for absconding duty is therefore not valid.

62. The Respondent further submitted that he was framed by the Principal on the ground of theft based on the reason that his cap was found at the scene but he did not clearly see the Respondent. The Respondent relied on the following decisions:

    Rebecca Ann Maina and 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR where the court stated that: -

    > "In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence.
    >
    > Peter Otabong Ekisa v County Government of Busia [2017] eKLR where the court stated that: -
    >
    > "The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.
    >
    > In the case of Godfrey Aniere v Unique Suppliers Limited [2015] eKLR where the court stated that: -
    >
    > "In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report

back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.

In New World Stainless Steel Limited v Cosmas Mbalu Munvasya [2021] eKLR the court stated that: -

"Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered."

63. On the issue whether the trial court failed to consider the evidence adduced by the Appellant the Respondent submitted that the court considered the evidence before it as adduced by both parties.

64. On the remedies the Respondent submitted that the Respondent did not rebut that he was entitled to all that was awarded to him. For emphasis the Respondent relied on the decisions in the case of Peter John Mwangi Kamau v Autolitho Limited [2013] eKLR the court held that: -

> " A claim for pay in lieu of leave (Public holiday and rest days) is to be allowed if the employer does not produce leave of records and bare statement by the employer that the claimant had exhausted his leave will not suffice. "

65. It was the submission of the Respondent that he was unfairly and unlawfully terminated and therefore he ought to be compensated for the unfair termination caused by the Appellant as per the provisions of section 49(1)(c) of the *Employment Act*, 2007 which provides that: -

> " (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following-
>
> (c) The equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

66. The Respondent further relied on the case of Benjamin Langwen v National Environment Management Authority [2016] eKLR where the court stated that: -

> " On the finding of the court that the claimant was unfairly terminated from his employment with the respondent, that basis alone give him remedies available under section 49 of the *Employment Act*. Upon such termination, all terminal dues payable are to be based upon the last gross monthly wage or salary of the employee at the time of dismissal/termination."

67. The Respondent submitted that no proof was availed to court showing that the Respondent's overtime dues were paid whenever he worked overtime. That in the case of Jane Achieng & another -v- University of Nairobi [2015] eKLR the court stated that: -

> " ...This is one of the unique features of employment and labour law where the burden of proof shifts from the employee to the employer. The reason for this is that in an employment arrangement, the employer possesses information that would not ordinarily be within the reach of the employee. The employer is therefore under a duty to produce all information

within its possession that would aid the Court to arrive at a just and fair determination of the dispute before it."

68. The Respondent also relied on the case of Peter John Mwangi Kamau v Autolitho Limited [2013] eKLR where the court held that: -

> " A claim for pay in lieu of leave (public holiday and rest days) is to be allowed if the employer does not produce leave of records and bare statement by the employer that the claimant had exhausted his leave will not suffice."

69. The Respondent prayed that the appeal be dismissed with costs.

Determination

70. I have considered the Appellant's Record of Appeal and the submissions by both parties. The grounds of appeal may be summarized into the following issues for determination:

    i. Whether the trial court erred in holding that the Respondent's termination was unlawful, unfair and unprocedural,

    ii. Whether the trial court erred in awarding the remedies as were awarded to the Respondent,

    iii. What orders should issue.

Whether the trial court erred in holding that the Respondent's termination was unlawful, unfair and unprocedural

71. In his claim and witness statement the Respondent stated that on 3rd April, 2017 he was denied entry into the school compound by the security guard manning the gate on instructions from the principal of the Appellant. He further stated that he called the principal who refused to take his call to explain the reason for locking him out of the employment premises. He stated that he was again denied entry the following day when the principal chased him away after waiting at the gate until lunch hour.

72. The Respondent testified twice during the trial. The first time was on 9th April, 2019 when the suit proceeded ex parte. On that day the Respondent testified that he left employment on 28th March, 2017. That he had burnt his hand while baking bread and his hand was swollen so he went to the bursar to ask for money to go to hospital but was not given any. That thereafter he was away for two days and reported back to work on 3rd April, 2017 when he was denied entry by the security guard at the gate on instructions of the Principal.

73. The Respondent testified again on 15th February, 2022 following the setting aside of the ex parte proceedings of 9th April, 2019. He testified that on 29th March, 2017 he left school at about 7.15 pm after his brother was hit by a motor vehicle.

74. The Respondent on the other hand testified through DW1, DW2 and DW3 that the Respondent was caught after stealing food items from the school kitchen and ran away. The he was issued with a show cause letter from the school dated 1st April, 2017 requiring him to report back to school which did not elicit any response. The Respondent was therefore interdicted by letter dated 13th April, 2017, invited for disciplinary hearing by letter dated 11th August, 2017 which again he failed to comply with and was eventually dismissed from employment by letter dated 28th August, 2017.

75. In the judgment the trial court found that the Respondent failed to comply with the provisions of section 45 of the *Employment Act* which provides that an employer should exercise their powers under the Act justly and equitably. The court further stated:

> "Considering that the Respondent did not produce any evidence to demonstrate that the Claimant was served with notice to appear for a disciplinary meeting, I would make a finding that the Respondent did not comply with the provisions of section 41 of the *Employment Act* 2007 and the only logical conclusion would be that they did not.
>
> I would therefore make a finding that the Claimant has proved her case on a balance of probabilities and make award to the Claimant as follows: ..."

76. The learned trial court ignored all the evidence adduced by the Appellant and the Respondent and narrowed the judgement only on the fact that there was no certificate of posting of the letter inviting the Respondent for disciplinary hearing. There was no consideration of the circumstances that led to the disciplinary hearing. There was no finding made on the culpability of the Respondent, no mention was made of the fact that the Respondent admitted that the address used in the letter was the correct one that he had given to the Appellant.

77. Before an employer can be required to prove that fair process in section 41 of the Act was complied with, the court must make a finding whether there was valid reason for termination. In the present case the Respondent gave different versions of what happened between 28th March, 2017 and 3rd March 2017 when his employment was terminated according to the Statement of Claim.

78. If it is true that he went to school on 3rd April, 2017 and talked to the principal on phone then he would have known about the notice to show cause dated 1st April, 2017. The said letter reads:

> Wareng High School
>
> Jonah Kimutai Sanga
>
> BOX 5210
>
> Eldoret
>
> 1st April 2017
>
> RE: Show Cause Why You Not Be Disciplined For Gross Misconduct And Absconding Duty.
>
> It is now three days since you failed to report on duty also on the night of Wednesday 29/3/2017 you together with one watchman Mr. Paul Kirongo stole food items from the school Kitchen and I together with one watchman Mr. David Kae on night duty, and the bursar Mr. Sammy Kemei busted you criminal scheme and this may be the reason why you have failed to report on duty for these number of days because you're feeling guilty of what you did.
>
> Please be notified that, if you do not show up on duty your case maybe referred to the Board of management (BOM) to show cause why you should not be discipled for gross misconduct and absconding duty.
>
> On the evening of Wednesday 29/03/2017 you and others came back to school at around 7pm and went to the Kitchen and bakery and packed food items in gunny bags. I the principal got a tip off about it and came back to school together with Sammy Kemei the Bursar. When we to close to you and your partners behind the dining hall you dropped the

package a you were carrying and you ran off, past the school main gate unfortunately you fell and your red cap fell off.

I, the principal, the bursar, Mr. Sammy Kemei and one watchman positively identified you physically and also through your brand red cap, you ran off into the darkness outside school.

2) Absconding duty

Ever since that incident happened on the night of Wednesday 29/03/2017 at 8pm you have been absent form duty without permission form school authorities. This clearly, may be due to your feeling guilty of having been involved in the criminal activity on the said night.

You are therefore, required to report on duty with immediate effect, failure of which disciplinary action will be taken against you.

Signed

Julius Kamatei

Secretary Bom

79. From the evidence on record, the letters written to the Respondent by the Appellant before the termination were 3; the notice to show cause, the interdiction letter and the letter inviting him for disciplinary hearing. If it is true that the Respondent did not receive any of these letters he still did not satisfactorily explain why he failed to report to work from 28th March, 2017 which would constitute desertion of duty, a valid ground for dismissal.

80. I find that from the evidence adduced before the trial court, the Appellant proved that there was valid reason for termination of the Respondent's employment, an issue which the trial court erred in failing to make a finding on.

81. Having found that there was valid reason for termination the next issue is whether the Appellant complied with fair procedure. From the evidence on record, the Respondent did. The fact that there was no proof of postage certificate alone is no proof that all 3 letters written to the Respondent before his dismissal were never posted. I find that the trial court erred in making such finding and basing its decision on the same while ignoring all the other evidence that would have led to a different conclusion.

82. I find that the evidence before the trial court was sufficient to make a finding that the Respondent was caught while in the Act of stealing food staff from the Respondent's kitchen by DW1 and DW2, who positively identified him, that when he was caught red-handed he dropped the items he was carrying and ran away. He did not go back to school, did not respond to the show cause letter, the interdiction letter and the invitation to attend disciplinary hearing sent to the address he gave to the Appellant which he confirmed belonged to the school his children attended. The trial court thus erred in finding that the termination was unfair.

83. From the foregoing I find that the Appellant had valid reason to terminate the Respondent's employment and complied with fair procedure in the termination of the Respondent's employment.

Remedies

84. On the remedies, the Respondent was awarded the following remedies by the trial court:

    a. One-month salary in lieu of notice Kshs. 10,496.90

    b. Leave dues for the entire period of service Kshs. 73,472

c. Compensation for unfair termination Kshs. 125,962.8

d. Salary for March 2017 Ksh.10,496.90

e. Outstanding overtime pay Ksh. 195,000

f. Overtime dues Ksh. 1,620,167.8

g. Salary underpayments Ksh.1,545,887.7

Total Claim Ksh.3,581,480

85. The trial court did not give any justification for any of the awards. The same were awarded as prayed.

86. It is trite that special damages must be strictly proved. In employment cases all averments in the claim are subject to proof and the fact that a claimant succeeds or fails to prove unfair termination does not automatically entitle or disentitle the claimant to the prayers sought. Each item prayed for must be specifically proved, including the existence of an employment relationship between the parties if not admitted or apparent from the record.

87. In the instant case, the court having found that the termination of the Respondent was not unfair, he is not entitled to pay in lieu of notice under section 49(1) of the *Employment Act* as read with section 35 of the Act.

88. The prayer for leave was not proved. Further, the Respondent did not explain how he arrived at the figure of Kshs. 73,000 claimed under this head. DW1 testified that all employees were given leave of 21 days during school holidays. The Respondent being a cook in a day school, the Respondent did not adduce any evidence to prove that he worked during all school holidays. The prayer is dismissed.

89. Having found termination of the Respondent' employment to have been fair, he is not entitled to compensation for unfair termination.

90. DW1 and DW2 both testified that the Respondent was not paid salary for March, 2017. The Respondent is thus entitled to the same and is awarded the same at Kshs. 8,500 being the salary he testified he was earning at the time of termination of his employment.

91. No evidence was adduced to prove that the Respondent worked overtime nor did the Respondent demonstrate how the figure of Kshs. 195,000 he claimed was arrived at. It is further not clear how this item is different from the claim for overtime dues of Kshs. 1,620,167.80. The Respondent worked as a cook in a school which served only lunch as stated by DW1. It is inconceivable that the Respondent worked overtime everyday including school holidays in such a setting. I find that these two prayers for outstanding overtime and overtime dues were not proved. The same are dismissed.

92. The Respondent was awarded Kshs. 1,545,887 for salary underpayments. He did not adduce any evidence to prove how much he was earning over the years as a basis for his claim. The pay slips he adduced for 2012 show that he was earning Kshs. 7,005. He testified that at the time of leaving service he was earning Kshs. 8,500 though he did not adduce any proof of the same. This was however not contested by the Respondent.

93. The minimum wage for a cook in Eldoret in March, 2017 was Kshs. 10,107.10 with a house allowance of 15% which would translate to Kshs. 1,516.10. The Respondent was thus entitled to payment at the rate of Kshs. 11,623.20 per month from 1st May, 2015 to March, 2017. This translates to an underpayment of Kshs. 3,123.20 per month. For 23 months from May, 2015 to March 2017 that translates to Kshs. 71,833.60 which I award the Respondent.

94. For the period 2012 to 2015 the minimum wage was Kshs. 9,024.15. With 15% house allowance of Kshs. 1,354 the Respondent was underpaid by Kshs. 1,878.15 per month for the 24 months which amounts to Kshs. 45,075.60 which the Respondent is awarded.

95. For the period before 2013 there is no evidence of underpayment.

96. The Respondent is entitled to certificate of service.

Conclusion

97. Having made the findings above, the appeal herein succeeds and I make the following orders:

    a. The judgment of the trial court dated and delivered on December 22, 2022 together with the decree are hereby set aside in its entirety and is hereby substituted with an order dismissing the Respondent's Statement of Claim dated August 27, 2018.

    b. The Respondent is awarded the following:

        i. Salary for March, 2017 Kshs. 8,500.00

        ii. Underpayments Kshs. 116,909.20

    c. The Appellant to issue certificate of service to the Respondent

98. Each party shall bear its costs of both the appeal and of proceedings in the trial court.

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

MAUREEN ONYANGO

JUDGE