



**Mutua v Mars Security Guards Limited (Employment and Labour Relations Appeal E067 of 2024) [2025] KEELRC 1832 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1832 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E067 OF 2024**

**JW KELI, J  
JUNE 20, 2025**

**BETWEEN**

**KIMANZI MUTUA ..... APPELLANT**

**AND**

**MARS SECURITY GUARDS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable L. Ambasi (CM) delivered at Nairobi on the 12th of March, 2024 in MCELRC No. E2041 of 2022)*

**JUDGMENT**

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Honourable L. Ambasi (CM) delivered at Nairobi on the 12<sup>th</sup> of March, 2024 in MCELRC No. E2041 of 2022 between the parties filed a memorandum of appeal dated the 11<sup>th</sup> of March 2024 seeking the following orders:-
  - a. This Appeal be allowed.
  - b. The decision of the learned Magistrate be set aside, overturned and or reversed and this Honourable Court be pleased to substitute with an Order that the Appellant's suit in the Lower Court be allowed for further prayers of;
    - i. The Honourable Court awards the Appellant Kshs. 5,000/= being the undisputed claim of uniform charges that the Respondent was willing to refund.
    - ii. The Honourable Court awards the Appellant Kshs. 9,445.15/= being unpaid salary arrears for the fourteen days worked in the month of March of the year 2022. The Honourable Court also awards the Appellant his salary arrears for the month of March to June of the year 2022.



- iii. The Honourable Court awards the Appellant Kshs. 20,500/= being one month pay in lieu of notice.
- iv. The Honourable Court awards the Appellant Kshs. 246,000/=being compensation equivalent to twelve months' salary for wrongful termination.
- v. The Honourable Court awards the Appellant Kshs. 84,387.24/=being accumulated severance pay for the seven years worked.
- vi. The Honourable Court awards the Appellant Kshs. 362,195.39/=being compensation for unpaid overtime worked.
- vii. The Honourable Court awards the Appellant Kshs. 108,147.60/=being compensation for unpaid public holidays worked.
- viii. The Honourable Court awards the Appellant Kshs. 353,937.60/=being compensation for unpaid rest days worked.
- ix. The Honourable Court awards the Appellant Kshs. 81,766.53=being accumulated twelve months housing allowance.
- x. The Honourable Court awards the Appellant a Certificate of service.
- xi. The Honourable Court awards the Appellant interest on the total.
- xii. The Honourable Court awards the Appellant costs in the lower court and on this Appeal to be borne by the Respondent.

### **Grounds of the Appeal**

- 2. The Honourable Magistrate erred both in law and fact in dismissing the Appellant's case on grounds that the Appellant wilfully left his employment and even wrote a resignation letter.
- 3. The Honourable Magistrate erred both in law and in fact in holding that the termination of the Appellant was lawful and fair.
- 4. The Honourable Magistrate erred in law in proceeding under the wrong principles of employment and labour Laws. Therefore the Appellant qualifies to be paid her employment dues that the learned magistrate failed to award.
- 5. The Honourable Magistrate erred in law by failing to consider section 74 of the [Employment Act](#) on the responsibility of the employer to provide employment records.
- 6. The Honourable Magistrate erred both in law and fact by failing to evaluate the evidence presented before her that clearly shows that the Appellant was employed as a guard supervisor/driver and that the salary provided for in the employment contract was different from the amount that was deposited in the Appellants bank account.
- 7. The Honourable Magistrate erred both in law and fact by failing to evaluate the evidence presented to her that shows that the Appellant was on 14<sup>th</sup> March 2022 sent on leave and was never paid any salary from the month of March of the year 2022 until the month of June 2022. On 27<sup>th</sup> June 2022, the Appellant tendered his resignation letter after failing to be recalled back to work or paid any salary.
- 8. The Honourable Magistrate erred both in law and fact by failing to consider the Appellant's employment contract provided for a salary of Kshs.17,700/=, housing allowance of Kshs.2,655/=,



and a fixed monthly overtime of Kshs.1,180/= but the Appellant was only paid through bank a monthly salary that ranged between Kshs.17,735/=and Kshs.17,966=which money was lower than the cumulative amounts provided in the employment agreement.

9. The Honourable Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for his unpaid salary for the fourteen days that he worked in the month of March of the year 2022 prior to being sent on leave.
10. The Honourable Magistrate erred both in law and in fact by failing to appreciate the undisputed claim of 5,000/= deducted as uniform charges which money the Respondent admitted having deducted and was willing to refund.
11. The Honourable Magistrate erred both in law and fact by failing to appreciate that on 27<sup>th</sup> June 2022, the Appellant tendered his resignation letter which was accepted, his terminal dues were calculated to be Kshs. 200/= and which calculation was part of the dispute between the parties. The Appellant had legitimate expectation that his salary from the month of March to June of the year 2022 and other employment benefits will form part of his terminal dues.
12. The Honourable Magistrate erred both in law and fact by failing to find that the Appellant was never issued with any pay slip that could have indicated the various deconsolidated benefits that were offered to the Appellant as such arriving at a wrong conclusion that the Appellant was paid for overtime worked.
13. The Honourable Magistrate erred both in law and fact by failing to evaluate the evidence presented to her that shows that the Appellant's employment agreement provided an cumulative salary of Kshs. 20,500/=which was inclusive of a fixed monthly overtime of Kshs. 1,180/=. The actual amount remitted to the Appellant bank ranged between Kshs.17,735/=and Kshs.17,966/=.
14. The Honourable Magistrate erred both in law and fact by failing to find that a fixed monthly overtime of Kshs.1,180/= is below the rate provided by the law and amount to an underpayment of overtime. It was an undisputed fact that the Appellant worked a twelve hour shift with daily four hour overtime.
15. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 362,195.39/= on account of overtime hours worked despite the overwhelming evidence adduced by the Appellant and admission by the Respondent to the claim that the Appellant worked a twelve (12) hours daily shift. The Appellant is entitled to compensation for overtime worked.
16. The Honourable Magistrate erred both in law and fact by failing to make a gratuitous award in favour of the Appellant for the sum of Kshs. 246,000.00/= ostensibly on account of compensation equivalent to twelve months' salary for unfair and /or wrongful or unlawful termination. The Appellant worked for the Respondent for seven years and seven months but was sent on leave and later informed that he will be communicated to on when to resume work but he was never recalled back to work. It was clear that the Respondent never observed the rules of natural justice prior to terminating the Appellant.
17. The Honourable Magistrate erred both in law and fact by failing to evaluate the evidence presented to her that shows that the Respondent's business was struggling and that it had reduced work stations as such it was only logical for the Respondent to down size his work force however the Respondent failed to follow the redundancy procedures.
18. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 84,387.24/= on account of severance pay despite the fact that the Appellant had worked for the Respondent for seven years. The learned Magistrate failed to



- appreciate the fact that the Respondent failed to follow procedures laid down for declaring an employee redundant.
19. The Honourable Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Kshs. 20,500/=ostensibly on account of one month pay in lieu of notice for unfair and /or wrongful dismissal or unlawful termination despite the fact that it was the Respondents conduct that led to the termination of the employment relationship. The Appellant was never issued any twenty-eight (28) days' termination notice by the Respondent.
  20. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 108,147.60/=on account of unpaid public holidays worked despite the overwhelming evidence adduced by the Appellant. The learned Magistrate failed to address her mind to the claim of unpaid public holidays worked. The overwhelming evidence was that the Respondent provided security services during public holidays which days the Appellant provided supervisory services. The Appellant was in law entitled to be paid twice (2) the normal rate for every public holiday worked.
  21. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 353,937.60/= on account of rest days worked without being compensated despite overwhelming evidence that the Appellant carried out his supervisory work without being offered any four days every month as rest days. The Appellant was in Law entitled to be compensated for every rest day worked.
  22. The Honourable Magistrate erred in law and fact by failing to find that the Appellant's employment agreement provided for a monthly housing allowance of Kshs. 2,655/= which allowance was never remitted to the Appellant's bank account. The Appellant was in law entitled to 15% of his salary as a housing allowance.
  23. The Honourable Magistrate erred both in law and fact in failing to award a Certificate of Service which the Appellant was in law entitled to. The Appellant had worked for seven years and seven months for the Respondent.
  24. The Honourable Magistrate erred both in law and fact by dismissing the Appellant's suit and directing the Appellant to bear the costs of this suit.
  25. The Honourable Magistrate erred in law and fact by failing to apply the law and appreciate the correct evidence adduced and tendered in Court.
  26. The Honourable Magistrate misdirected herself in her analysis, evaluation, interpretation and assessment of the entire evidence tendered by the Appellant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.
  27. The learned Magistrate erred in law in basing her decision on extraneous factors.
  28. The entire decision is contrary to law and a misapprehension of the law.

### **Background To The Appeal**

29. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 12<sup>th</sup> of October 2022 seeking the following orders:
  - a. A declaration that the termination by the Respondent was unlawful, malicious, and contrary to legal procedure.
  - b. A declaration that the Claimant's right to fair labour practices has been breached.



- c. A declaration that the Claimant is entitled to his employment benefits even upon termination.
  - d. Maximum compensation for wrongful termination.
  - e. Special damages.
    - I. Unpaid Salary Kshs. 9,445.15
    - II. One month's pay in lieu of notice Kshs. 20,500.00
    - III. Uniform deductions Kshs. 5,000.00
    - IV. Damages for wrongful dismissal Kshs. 246,000.00
    - V. Severance Kshs. 84,387.24
    - VI. Unpaid public holidays Kshs. 108,147.60
    - VII. Rest days Kshs. 353,937.60
    - VIII. Overtime Kshs. 362,195.39
    - IX. Housing allowance Kshs. 81,766.53 Total Kshs. 1,741,717.00
  - f. Interest on the total.
  - g. Certificate of Service.
  - h. Costs of the cause.
    - i. Any further relief this Honourable Court may deem fit and just to award under the circumstances.(see pages 13-20 of the ROA dated the 10<sup>th</sup> of February 2025)
30. The Appellant also filed his verifying affidavit, list of witnesses, witness statement and list of documents all dated the 12<sup>th</sup> of October 2022 (pages 21-37 of ROA).
31. The claim was opposed by the Respondent who entered appearance and filed an answer to memorandum of claim dated 23<sup>rd</sup> January 2023 (pages 39-41 of ROA). They also filed a list of witnesses (page 42 of ROA); witness statement of Jackson Ochieng Orondo (pages 43-44 of ROA); and list of documents (page 45-64 of ROA).
32. The Claimant's/Appellant's case was heard on the 30<sup>th</sup> of October 2023, where the Claimant testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Respondent, Mr.Sale (pages 143-144 of ROA).
33. The Respondent's case was heard on the same day, where the Respondent testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Appellant, Mr. Magonda (pages 144-146 of ROA).
34. The parties took directions on filing of written submissions after the hearing. The parties complied.
35. The Trial Magistrate Court delivered its judgment on the 12<sup>th</sup> of March 2024 dismissing the Claimant's claim and awarding the Respondent costs of the suit (Judgment at pages 138-141 of ROA).

### **Determination**

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



37. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-  
“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

38. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

#### Issues for determination

39. In his submissions dated the 12<sup>th</sup> of March 2025, the Appellant identified the following issues for determination:

- i. Whether the trial court erred in law and fact by holding that the Appellant absconded from work followed by a resignation letter.
- ii. Whether the Appellant is entitled to the prayers sought.
- iii. Who bears the costs of the suit.

40. On their part, the Respondent identified the following issues for determination in their submissions dated the 24<sup>th</sup> of April 2025:

- i. Whether the learned Magistrate erred in law and in fact in holding that the Appellant’s termination was lawful and fair.
- ii. Whether the learned Magistrate erred in law and in fact in determining that the Appellant was not entitled to the reliefs sought in the memorandum of claim.
- iii. Who shall bear costs of this appeal and that of the lower court.

41. The considered the following as the relevant issues for determination in the appeal–

1. Whether the termination was fair
2. Whether the appellant was entitled to reliefs sought in the claim Whether the termination was fair

42. The claimant claimed constructive dismissal on basis that his resignation was from frustration of not being recalled to work after proceeding on leave on 14<sup>th</sup> march 2022. The respondent in response stated



that the claimant on proceeding on leave was required to report back from leave after 22 days but did not. The Respondent produced a letter to the Ministry of Labour on the issue which stated as follows:-

‘Date: 28/04/2022

Sub County Labour Office. Industrial Area.

BOX 18183-00500 NAIROBI,

Dear Sir/Madam

Re: Kimanzi Mutua

ID No.23737291

We wish to inform your good office that the above named employee of this firm went on annual leave and he was expected to resume duty on 20/04/2022 but since then he has not reported, neither the office management has information of his whereabouts.

By this letter we wish to advice due to nature of our services, the management is forced in his replacement in position vacant. We highly appreciate your cooperation in acknowledgement of the employee absconding the employment.

Thank you.

Yours faithfully

Faustine Barasa,

For: Mars Security Guards Ltd”.(page 63 of ROA). The letter was received by labour office on the same date of 28<sup>th</sup> April 2022.

43. It was not clear to this court, on perusal of the pleadings of the respondent, when the appellant proceeded on leave for the 22 days (cross-examination at pages 144) . The letter to the labour officer stated the appellant was expected to resume duty on 20<sup>th</sup> May 2022. (supra) . The claimant stated he was sent on leave on 14<sup>th</sup> March 2022. The court on the reason advanced of absconding established from the letter dated 28<sup>th</sup> April 2022 to labour office, the employer did not disclose efforts towards reaching the appellant to return to work. Under section 74 of the *Employment Act*, the employer had duty to keep employee records which ought to have included the appellant’s phone number and address. There was no effort made to notify the appellant that his employment was being terminated for reason absconding. It is now settled jurisprudence that in the case of reason of termination of as absconding by employee, the employer must take steps towards termination of the employment according to section 41 of the *Employment Act*. This was not done. In *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR held that: -“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts were made to contact such an employee without success.” There are other numerous authorities of the court to the same effect. The trial court erred in failing to find there was no compliance with section 41 in the termination which was deemed to have happened vide letter dated 28<sup>th</sup> April 2022. The resignation letter dated 8<sup>th</sup> August 2022 (page 64 of ROA), in the opinion of the court had been long overtaken by the event of termination as per the letter to labour dated 28<sup>th</sup> April 2022 (page 63 of ROA). In the upshot, the court finds the trial court erred in finding no case of unfair termination and the finding is set aside. The court in place holds the termination was unfair. Whether the claimant was entitled to reliefs sought
44. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 12<sup>th</sup> of October 2022 seeking the following orders:



- j. A declaration that the termination by the Respondent was unlawful, malicious, and contrary to legal procedure.
  - k. A declaration that the Claimant's right to fair labour practices has been breached.
  - l. A declaration that the Claimant is entitled to his employment benefits even upon termination.
  - m. Maximum compensation for wrongful termination.
  - n. Special damages.
    - X. Unpaid Salary Kshs. 9,445.15
    - XI. One month's pay in lieu of notice Kshs. 20,500.00
    - XII. Uniform deductions Kshs. 5,000.00
    - XIII. Damages for wrongful dismissal Kshs. 246,000.00
    - XIV. Severance Kshs. 84,387.24
    - XV. Unpaid public holidays Kshs. 108,147.60
    - XVI. Rest days Kshs. 353,937.60
    - XVII. Overtime Kshs. 362,195.39
    - XVIII. Housing allowance Kshs. 81,766.53 Total Kshs. 1,741,717.00
  - o. Interest on the total.
  - p. Certificate of Service.
  - q. Costs of the cause.
  - r. Any further relief this Honourable Court may deem fit and just to award under the circumstances. (see pages 13-20 of the ROA dated the 10<sup>th</sup> of February 2025)
45. On finding unfair termination the court is obliged to award remedies under section 49 of the *Employment Act*. The appellant was entitled to notice and pay is awarded in lieu for Kshs. 20,500.
  46. Taking into account the manner in which the termination happened and the sickness of the claimant due to cold exposure from the work (the claimant produced evidence of the treatment for cough with blood at pages 32, 33 of ROA). The court found with that kind of illness it was unlikely for the claimant to work as a night guard again. Further taking into account the period of work for 7 years and the court guided by similar cases awarded 10 months gross salary as compensation for the unfairness. 205,000/- (see *Wilson Kibande Abai v Kenya Tents Limited* [2019] eKLR and *Obonyo v Kibos Sugar & Allied Industries* [2024] KEELRC 1392 (KLR))
  47. The claimant sought salary for 13 days worked in April and the same is awarded as sought 9445.15.
  48. The respondent told the trial court it was willing to refund Uniform deductions for the sum of Kshs. 5,000.00 and the same is allowed.
  49. On claims for housing the salary paid had housing component under contract (page 46 of ROA). The same is disallowed.



50. On claims for overtime, rest days and public holidays the court found overtime was paid in the payslip month. It is not for the court to re-write parties' contracts. Secondly, on the other claims of public holidays and rest days, the same must be proved strictly and the court found no evidence before the trial court to support the claims. The claim of severance was not applicable as this was not a case of redundancy. Severance is payable in case of redundancy under section 42 of the Employment Act. There was no basis to disturb the finding of the trial court on these items (Mbogo v Shah.)

### **Conclusion**

51. The appeal is allowed. The Judgment and Decree of the Honourable L. Ambasi (CM) delivered at Nairobi on the 12<sup>th</sup> of March, 2024 in MCELRC No. E2041 of 2022 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

- a. The termination was unfair
  - b. Notice pay of 1 month's salary Kshs. 20,500
  - c. Compensation for unfair termination Kshs. 205,000
  - d. Refund of uniform deductions Kshs. 5,000
  - e. Interest on the total sum awarded of Kshs. 230500 (b-d above) at court rates from date of judgment.
  - f. Costs of the suit.
52. The appellant is awarded costs of the appeal.
53. Stay of 30 days granted.
54. It is so Ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant –Magonda

Respondent: Sala

