



**Singh v Wario (Employment and Labour Relations Appeal
E041 of 2024) [2025] KEELRC 1837 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1837 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E041 OF 2024**

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

BETWEEN

GURDEV K. SINGH APPELLANT

AND

BARAKO WARIO RESPONDENT

*(Being an Appeal from the Judgment and Orders of the Honourable H.M. Nyaga (CM)
delivered at Nairobi on the 2nd day of December, 2023 in MCCC No. 977 of 2008)*

JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Orders of the Honourable H.M. Nyaga (CM) delivered at Nairobi on the 2nd day of December, 2023 in MCCC No. 977 of 2008 between the parties filed a memorandum of appeal dated the 27th of February, 2024 seeking the following orders:-
 - a. This Appeal herein be allowed.
 - b. The part of the decision of Honourable H.M. Nyaga Chief Magistrate delivered on 2nd December 2023 awarding the Respondent the sum of Kshs. 40,128/- in underpayment be set aside.
 - c. Costs of the Appeal and in the lower court be awarded to the Appellant.

Grounds of the Appeal

2. That the Honourable Trial Magistrate erred in law by awarding the claimant Kshs.40,128/- in underpayment whereas there was no prayer for underpayment made by either party.
3. That the Honourable Trial Magistrate erred in law by awarding the claimant Kshs. 40,128/- in underpayment whereas the issue of underpayment had neither been raised, pleaded nor submitted on by either party.



4. That the Honourable Trial Magistrate erred in law and in fact by finding that as at the year 2006, the standard minimum wages for night watchmen was gazetted at Kshs.8,136/- whereas the same was gazetted at Kshs.5,796/-.
5. That the Honourable Trial Magistrate erred in law and in by awarding costs to the claimant despite dismissing the claimant's entire claim.

Background to the Appeal

6. The Respondent filed a claim against the Appellant vide a plaint dated the 19th of February 2007 seeking the following orders:-
 - a. Principal sum of Kshs.107,186.00.
 - b. Costs of this suit.
 - c. Interest in (i) and (ii) above.
 - d. Any other relief as the court deems just.(Pages 4-5 of the ROA dated 5th February 2025).
7. The Respondent filed his verifying affidavit, list of witnesses, witness statement, and further list of documents, all dated 27th August 2018 (pages 33-41 of ROA).
8. The claim was opposed by the Appellant who entered an appearance and filed a defence dated 8th April 2008 (pages 7-9 of ROA). He also filed an undated witness statement (pages 90-94 of ROA); and documents (page 95-106 of ROA).
9. The Claimant's/Respondent's case was heard on the 3rd of September 2019, where the Claimant testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Appellant. Mbogori (pages 243-246 of ROA).
10. The Appellant's case was heard on the 26th of January 2022. The Appellant testified relying on his filed witness statement, and produced the Appellant's documents. He was cross-examined by counsel for the Claimant/Respondent, Khalwale (pages 253-255 of ROA).
11. The parties took directions on filing of written submissions after the hearing. The parties complied.
12. The Trial Magistrate Court delivered its judgment on the 2nd of December 2022 partially allowing the Claimant's claim and awarding him the sum of Kshs. 40,128/- being underpayment for 12 years. (Judgment at pages 261-263 of ROA).

Determination

13. The appeal was canvassed by way of written submissions. Both parties filed.
14. 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.”

15. 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

16. I have distilled the following issues for determination from the Appellant’s submissions dated the 13th of March 2025:
- i. Whether the Honourable Magistrate erred in awarding underpayment when it was neither pleaded nor was it an issue at trial.
 - ii. Whether there was actual underpayment as per the applicable Regulation of Wages Order in force in 2006.
17. On his part, the Respondent identified the following issues for determination, which are commensurate with the grounds of appeal as set out in the Appellant’s memorandum of appeal dated 27th February 2024, in his submission dated the 8th day of April 2025:
- i. Whether the Honourable Trial Magistrate erred in law by awarding the claimant Kshs.40,128/- in underpayment whereas there was no prayer for underpayment, and neither was it raised, pleaded nor submitted on by either party.
 - ii. Whether the Honourable Trial Magistrate erred in law and in by awarding costs to the claimant despite dismissing the claimant’s entire claim.
18. The court having perused the issues raised by the parties found there was only one issue for determination being :- Whether the Honourable Trial Magistrate erred in law by awarding the claimant Kshs.40,128/- in underpayment.

Appellant’s submissions

19. As has been previously submitted before this Honourable Court, the history of this matter is not materially disputed and has been set out in the ensuing paragraphs 1 to 21. The Respondent worked as the Appellant’s night watchman from 1989 until sometime in November 2006 when he was dismissed for cause.
20. Honourable Nyaga having heard the parties, on 2nd December 2022 delivered Judgement dismissing the Respondent’s entire claim but awarding him an un-prayed for amount of Kshs. 40,128/- as alleged underpayment in the following terms "However it is to be noted that as at the year 2006 the standard minimum wages were gazette as Kshs 8,136 and as it stands the Plaintiff was being paid Kshs 7,300 therefore there was a case for underpayments. Therefore underpayment (836 x 12) x 4 years = Kshs 40,128/= And give costs to the Plaintiff" A copy of the said Judgement is at pages1 to 2 of the Appellant’s Authorities. It is the said portion of the judgement that the Appellant is aggrieved by and which portion forms the subject of this appeal.



21. The basis of the Appellant's appeal is two pronged and based on the grounds that:
- a) Underpayment was neither pleaded nor submitted on by either party and was never in issue during the trial. The learned Magistrate therefore erred in awarding an unprayed for item.
 - b) Even if underpayment had been pleaded (which it was not) the Regulation of Wages Order (Legal Notice No. 38) in force in 2006 (when the Respondent's employment was terminated), indicates that the applicable monthly minimum wage for night watchmen was Kshs. 5,796/- and not Kshs 8,136/-. As the Respondent being paid Kshs 7,300/= per month, there was therefore a demonstrable error on the Magistrate's part on the issue of underpayment. A copy of the said Regulation of Wages Order (Legal Notice No. 38) is at pages 205 to 208 of the Record of appeal and the specific wages for Night Watchmen is at page 206 (item 3) thereof.

On underpayment not being pleaded or being in issue in trial

22. The appellant submitted that the Plaintiff did not plead for underpayment the said matter was not in issue and nor was it ever addressed or submitted on by any of the parties during the proceedings. That one of the underpinning cornerstones of our legal system is the principle that parties are bound by their pleadings. The appellant relied on the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others 10. 2014) KLR as cited with approval in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR where the court therein cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
See paragraph 11 at page 5 of the Appellant's bundle of Authorities.”

23. That the said principle was similarly re-stated in Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR which cited with approval the of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs. Nyasulu [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the



parties. To do so would be enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice. See page ... of the bundle of Authorities."

24. The appellant submitted that in line with the above authorities, it was extremely prejudicial for the entire case to have been heard and defended on the basis of the pleadings filed by the Plaintiff only for the Honourable Magistrate to introduce an entirely new causes of action in his judgement without the Appellant having had any opportunity to respond to the same. In the case of *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR the Court of Appeal observed as follows on the issue of awarding un-sought prayers. "If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders." See page 13. In line with all of the above, the award of underpayment having neither been pleaded, prayed for nor submitted on, it ought not to have been granted.

On whether there was actual underpayment as per the applicable regulation of wages order

25. The appellant submitted that a plain reading of Honourable Nyaga's judgement shows that the Kshs 40,128/ awarded to the Plaintiff for underpayment was based solely on his position that the wages order in force in 2006 allegedly provided for a night watchman's minimum wage at Kshs 8,136/-. There is therefore a question of fact and Law as to whether the said minimum wage in 2006 was in fact Kshs 8,136/- No other facts are really in dispute. There is no dispute between the parties that the Plaintiff was employed as the Defendant's night watchman. It is also not disputed that at the time the Plaintiff's employment was terminated, he was earning Kshs 7,300/ a month. There is also no dispute that such employment was terminated in 2006. To establish the minimum wage applicable to night watchmen in 2006, one need only look at the applicable general wages order on what figure was quoted. Looking at [Legal Notice No. 38 of 2006](#), the same unambiguously provides that the minimum wage for night watchmen in 2006 was Ksha 5,796/ which fact evidences a clear and demonstrable error on the part of Honourable Nyaga. See the said Regulation of Wages Order (Legal Notice No. 38) at pages 205 to 208 of the Record of appeal and the specific item on Night Watchmen at page 206 (item 3) thereof."

Respondent's submissions

26. The Respondent vide a plaint dated 19.02.2007, sued the Appellant for wrongful dismissal and failure to pay terminal dues. the Respondent worked for 17 years and while in employment he was attacked by robbers and seriously injured for which he was hospitalized. The prayers to the Court were as follows;
- a) Principal sum of Kshs.107,186/-
 - b) Cost of the suit.
 - c) Interest on (a) and (b) above.
 - d) Any other relief as the court deems fit.



The said Plaintiff was later amended on 27.08.2018 to include;

- a) A. General damages for pain and suffering.
- b) A. Medical expenses.
- c) Interest on (a) and (b) above
- d) Any other relief as the court deem just.

27. The matter was screened for Court annexed mediation which the parties attended and agreed to settle the issue upon the Appellant paying to the Respondent an all-inclusive sum of Kshs.100,000/=, later the Appellant turned around and refused to honour the mediation agreement. The Appellant filed a response to the claim in which he admitted having employed the Claimant as a security guard since 1989 and alleged that the Respondent was procedurally terminated and paid his dues.
28. The Appellant under Grounds 1, 2 and 3 of the Appeal took issue with the lower court awarding the Respondent Kshs. 40,128/- as underpayment. This is based on the reason that the Respondent did not plead underpayments in his claim before court. And that the parties did not get opportunity to submit on the issue of underpayments. The respondent opposes these grounds on the basis that the Honourable Court was within its rights to fashion an appropriate remedy. In both the original and the amended claim referred to above, one of the Respondents prayers to the Court is "any other relief as the court may deem just". The Honourable court has a wide discretion to grant any relief if deems fair and just. Article 23 of *the Constitution* of Kenya 2010, empowers Kenyan Courts to fashion appropriate reliefs regarding fundamental rights. Article 41 of *the Constitution* provides that fair labour practices are a right under *the Constitution*. In the case of *Caroline Karimi Moses v. Insurance Regulatory Authority & 3 Others* [2019] KEHC 10384 (KLR) the concept of fashioning appropriate remedy was rendered thus: "Accordingly, the court is enjoined under article 23 of *the Constitution* to fashion appropriate remedy depending on the circumstances for each case This has been echoed in decisions such as *Republic v. Independent Electoral & Boundaries Commission & 3 Others* [2025] KEHC 3471 (KLR) where it was determined that: The same position was held in the South African case of *Fose vs Minister of Safety and Security* (CCT 14/96) 1997, ZACC 6, 1997, thus: "[Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights..... In our context an appropriate remedy must mean an effective remedy" (Emphasis supplied) Similar sentiments have been rendered by the Employment Court. These are in the following decisions *Agwa v. Governor, Kisumu County & 3 Others* [2024] KEELRC 1595(KLR). *Peter Wambugu Kariuki & 16 Others v. Kenya Agricultural Research Institute* [2013] KEELRC 373(KLR). That from the forgoing the lower court was therefore not in error to award the Respondent the Kshs. 40,128/- as underpayments for the period he served the Appellant as a night watchman.

Decision

29. It was not in dispute that there was no prayer for underpayment in the suit before the trial court. The trial magistrate stated the prayers to be for notice , annual leave and severances pay (page 261). The court noted there was an amended claim (page 30-31) but there being no cross-appeal hence the court followed the judgment. The trial court found no merit in the claims as sought. The trial court then stated :- 'However it is to be noted that as at the year 2006 the standard minimum wages were



gazetted as Kshs. 8136 and as it stands the plaintiff was being paid Kshs 7300. Therefore there was a case for underpayment.’ The trial court proceeded to award underpayment for 4 years of 836 for KSHS. 40,128.

30. The trial court did not justify the basis of granting the unpleaded and unsprayed for underpayment. The respondent relied on the prayer of ‘any other relief as the court deems just ’ and further on the authority in *Caroline Karimi Moses v. Insurance Regulatory Authority & 3 Others* [2019] KEHC 10384 (KLR) the concept of fashioning appropriate remedy was rendered thus: “Accordingly, the court is enjoined under Article 23 of *the Constitution* to fashion appropriate remedy depending on the circumstances for each case This has been echoed in decisions such as *Republic v. Independent Electoral & Boundaries Commission & 3 Others* [2025] KEHC 3471 (KLR) where it was determined that: The same position was held in the South African case of *Fose vs Minister of Safety and Security* (CCT 14/96) 1997, ZACC 6, 1997, thus: “[Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights..... In our context an appropriate remedy must mean an effective remedy”(Emphasis supplied) Similar sentiments have been rendered by the Employment Court. These are in the following decisions *Agwa v. Governor, Kisumu County & 3 Others* [2024] KEELRC 1595(KLR). *Peter Wambugu Kariuki & 16 Others v. Kenya Agricultural Research Institute* [2013] KEELRC 373(KLR).
31. Conversely, the appellant on other relied on in *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR which cited with approval the *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] *Current Legal problems*, at P174 whereof the author stated;
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”
32. The Court finds that the authority relied on by the respondent relates to enforcement of constitutional rights under Article 23 of *the Constitution* where the court can fashion appropriate remedies to redress constitutional violations. I am persuaded by the authority in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3, in



which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author stated;

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33. The court cannot introduce new prayers which ought to be proved under the undefined prayer of “any other relief”. The court is a neutral umpire in claims. How did the trial magistrate then come up with the prayer of underpayment when the issue was not raised in the pleadings or at the trial? There was no such issue left to the trial court to determine (Odd Jobs V Mubea). The award by the trial court of the underpayment set a very dangerous road to tread and the court at appellate stage has an obligation to nip such practice. The court cannot imagine the case of the parties. The parties must seek prayers from the court, plead and prove their cases for the court to consider. The court cannot grant a prayer out of blue. The parties must have canvassed the order granted before the court (Odd Jobs v Mubea). The court further noted that the trial court applied irrelevant figures to find the underpayment. The court noted that the respondent in submissions did not dispute that the applicable wages for night guard was Kshs. 5796 under the 2006 Regulation of Wages (General) amendment order 2006 (pages 205-206 of ROA). The claimant was paid Kshs 7300 way above the minimum wages of 2006 for night guard. The trial court thus erred in two ways, granting unpleaded and unproved prayer and misapprehended the applicable law. The court then found it had basis to interfere with the award and judgment of the trial court (Mbogo v Shah).
34. The appeal is allowed. The Judgment and Orders of the Honourable H.M. Nyaga (CM) delivered at Nairobi on the 2nd day of December, 2023 in MCCC No. 977 of 2008) is set aside and subsisted with an order that the claim is dismissed with costs to the respondent. The court took into account the status of the respondent as a former night guard of 17 years of service with the appellant and to temper justice with mercy made no order as to costs in the appeal.
35. The file is marked as closed.
36. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS ON THE 20TH DAY OF JUNE 2025.

**J.W. KELI,
JUDGE.**

In the presence of:



Court Assistant: Otieno

Appellant – Mbogori

Respondent: Ochieng h/b Khalwale

