



**Mwabaka v Bungoma Branch Manager, Kenya Farmers Association Limited & another
(Appeal E018 of 2023) [2025] KEELRC 1677 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1677 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
APPEAL E018 OF 2023
DN NDERITU, J
JUNE 5, 2025**

BETWEEN

KIZITO MUYONGA MWABAKA APPELLANT

AND

**BUNGOMA BRANCH MANAGER, KENYA FARMERS ASSOCIATION
LIMITED 1ST RESPONDENT**

KENYA FARMERS ASSOCIATION LIMITED 2ND RESPONDENT

*(Being an appeal in part from the judgment and decree in Bungoma
Chief Magistrate's Court ELRC Cause No. 1 of 2021 by Hon.
T.M. Olando (PM) dated and delivered on 9th November, 2023)*

JUDGMENT

I. Introduction

1. In a judgment delivered on 9th November, 2023 the lower trial court partially allowed the appellant's claim and dismissed the respondent's counterclaim. The appellant was awarded Kshs40,000= for three months' salary in lieu of notice, compensation equivalent to five months' salary, and gratuity for four worked years. He was also awarded costs of the cause.
2. Dissatisfied with the judgment, the appellant, through Robert Wamalwa & Company Advocates, commenced this appeal by way of a memorandum of appeal dated 24th November, 2023 raising the following grounds of appeal –
 1. That the trial magistrate erred in law and fact by holding that since the appellant was being paid Kshs4,000= per month he cannot claim for salary arrears hence arriving at wrong decisions.
 2. That the trial magistrate erred in law and fact in refusing to award the appellant for unpaid holiday, hence arriving at a wrong decision.



3. That the trial magistrate erred in law and fact in refusing to award the appellant for house allowance hence arriving at wrong decision.
 4. That the trial magistrate erred in law and fact in refusing to award the appellant for NHIF and NSSF statutory deduction, hence allowing at a wrong decision.
 5. That the trial magistrate erred in law and fact by only awarding damages for 5 months instead of 12 months as the law so provides and more so calculating on Kshs4,000= per month instead of Kshs28,822.10= per month hence arriving at wrong decision.
 6. That the trial magistrate erred in law and fact by awarding 3 months in lieu of notice to be calculated on Kshs4,000 = per month instead of Kshs28,822.10 = per month hence arriving at wrong decision.
 7. That the trial magistrate erred in law and fact by holding that the appellant negotiated for salary of Kshs4,000 per month and did not complain when the law is very clear that the salary should be based on the wage bill, hence arriving at wrong decision.
 8. That the trial magistrate erred in law and fact by not allowing a claim of leave allowance, hence arriving at a wrong decision.
 9. That the trial magistrate erred in law and fact by not giving reasons of his decisions.
 10. That trial magistrate erred in law and fact by not framing issues, hence arriving at wrong decision.
 11. That trial magistrate erred in law by not grant the prayer of certificate of service. Hence, arriving at a wrong decision.
3. The appellant is seeking for the following reliefs –
 1. That the appeal herein be allowed.
 2. That the decision of the trial magistrate be overturned and fresh judgment be entered against the respondents as prayed in the memorandum of claim.
 3. That costs of this appeal be paid by respondents.
 4. The respondents opposed the appeal through S.M. Omae & Company Advocates.
 5. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Wamalwa, filed written submissions on 15th October, 2024 and Mr. Ratemo for the respondent, filed on 11th February 2025.

II. Submissions By Counsel

6. The appellant’s counsel argued the grounds of appeal into four categories – Grounds 1,5,6, &7 of the record of appeal; Grounds 3 & 4 - house allowance, NSSF & NHIF; Ground 8 leave allowance; and Ground 11 certificate of service; and overtime.
7. On the first ground, it is submitted that the appellant was employed on permanent basis as a sales clerk from 1st November, 2017 until 15th May, 2020 during which time he was allegedly underpaid. Citing *Job Wanyonyi Simiyu v Shayona Stationeries (Africa)Ltd & Anor (2022) eKLR*, counsel submitted that based on the minimum wages orders the appellant was entitled to Kshs28,822.10= per month and not Kshs4,000= as held by the trial court, and was thus entitled to the underpayments.



8. Further, citing Kenya broadcasting Corporation v Geoffrey Wakio (2019) eKLR and Maube V Exotica Restaurant Limited KEELRC 281(KLR), it is submitted that the appellant was entitled to maximum compensation as damages as he did not in any way contribute to his dismissal. It is submitted that the appellant be awarded maximum compensation equivalent to 12 months' salary.
9. On the second ground, counsel cited Morris Kavale Kasyoki v Narcol Aluminium Rolling Mills Limited (2014) eKLR and submitted that the appellant was entitled to NHIF and NSSF statutory remittances deducted from his salary.
10. It is further submitted that the appellant was entitled to house allowance that was not during the period of employment.
11. On the claim for leave allowance, it is submitted that the trial court erred in failing to award leave allowance of Kshs115,288.40= for the years from 2017 to 2020 as claimed.
12. It is further submitted that the appellant was also entitled to a certificate of service, pay for overtime, and pay for holidays worked.
13. On the other hand, the counsel for the respondent submitted globally and jointly on all the grounds of appeal. Citing Ndwiga v Kathageri Youth Polytechnic (2025) KEELRC 77(KLR) and Anunda v Tiger Force Security Services Limited (2023) KEELRC 3273(KLR), it is submitted that the appellant failed to prove he was underpaid by failing to state the locality where he worked from and only citing the legal notice under which he claimed underpayment in his submissions. It is submitted that submissions are not pleadings.
14. Further citing Philip Omukule v Tapoz contractors Ltd (2021) eKLR, and James Orwaru Nyaundi v Kilgoris Classic Sacco Limited (2022) eKLR, it is submitted that the appellant did not prove the special damages for unpaid holidays as obligated under Section 80 of the *Evidence Act*. It is submitted that RW1 testified that the respondent did not open on public and other holidays as to have entitled the appellant to the claimed holiday pay.
15. On the claim for house allowance, it is submitted that no agreement entitled the appellant to a salary of Kshs28,822.10= and the legal notice No. 2 of 2018 that the appellant wished to rely on was unlawfully applied retrospectively.
16. On the claim for refunds of deductions made and payable to NSSF and NHIF, it is submitted that the appellant did not plead any deductions payable to NSSF and only introduced the same in the submissions by his counsel. It is submitted that deductions to NHIF were not proved and, in any event, the same is owed to a statutory body that is capable of enforcing any defaults. Counsel cited Simiyu v Nzoia Sugar Company Limited (2022) KEELRC1 758(KLR) in support of this argument.
17. On the award of compensation, counsel cited various decisions – Gitobu Imanyara & 2 others v Attorney General (2016) eKLR; Kiambaa Dairy Farmers Cooperative Society V Rhoda Njeri & 3 others (2018) eKLR, & United States International University v Eric Rading Outa (2016) eKLR, submitting that the award of five months' salary has not been proved to be too low. It is further submitted that the appellant failed to prove that he was entitled to a monthly salary of Kshs28,222.10.
18. It is submitted that the trial court awarded the appellant three months' salary in lieu of notice, yet the appellant had claimed for one month's salary in lieu of notice.
19. On leave, it is submitted that the appellant failed to prove that he was entitled to annual leave and the court should uphold the lower trial court's finding on this issue.



20. It is further submitted that the appellant neither pleaded nor proved that he was entitled to overtime. Counsel cited Philip Omukule v Tapoz contractors Ltd (2021) eKLR & James Orwaru Nyaudi v Kilgoris Klassic Sacco Limited (2022) eKLR in support of that argument.

III. Issues for Determination

21. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for the parties as summarized above. The following issues commend themselves to the court for determination –
- a. What was the nature and length of the appellant’s employment with the respondent?
 - b. Was the appellant’s termination unfair and unlawful?
 - c. Did the lower trial court arrive at the correct decision in regard to the above issues and the reliefs awarded?
 - d. What are the appropriate orders for this court to make in regard to the above issues and on costs?

IV. Employment

22. As the first appellate court, this court is obligated to evaluate the evidence on record and arrive at its own conclusions, but bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle & Another v Associated Motor Boat Co. Ltd & others* (1968) E. A.12.
23. As per the pleadings and the evidence in the lower trial court, the appellant’s case is that he was engaged by the respondent as a sales clerk in the respondent’s Bungoma branch from 1st November, 2017 to 15th May, 2020 when he was terminated without any justifiable reason(s) or due process. He stated that his last known monthly salary was Kshs4,000=, which he asserted was an underpayment as he ought to have been earning Kshs28,822.10 per month.
24. He testified that he was dismissed verbally by the respondent’s manager on the allegations that he was a thief. He further stated that he had not stolen any money or property of the respondent, and that no letter or warning was issued to him to that effect.
25. It is the appellant’s case that the respondents violated Sections 41, 43, 44, & 45 of the *Employment Act* in terminating him in the manner that happened.
26. It is on the basis of the foregoing that the appellant prayed for the following reliefs in his claim as filed in the lower trial court –
- i. Make a declaration that the claimant was permanently and pensionably employed by the respondent.
 - ii. Make a declaration that the claimant’s services were unlawfully and unfairly terminated.
 - iii. The respondents do pay the claimant a sum of Kshs1,471,819.57 herein as particularised in paragraphs 16 & 17 of the claim, and he also prays for certificate of service.
- Broken down as follows –
- a. One month’s salary in lieu of notice Kshs28,822.10
 - b. Salary Underpayment Kshs922,307.20



- c. Unpaid Public holidays (2017-2020) Kshs26,899.60
- d. House allowance Kshs138,346.10
- e. Overtime allowance Kshs153,712=
- f. Gratuity Kshs57,644.20
- g. Leave allowance Kshs115,288.40
- h. Unremitted NHIF dues Kshs16,000=
- i. Unremitted NHIF dues Kshs12,800=
- j. Costs of this suit
- k. Interest

27. In their statement of response and counterclaim and set-off to the claim, the respondent denied engaging the appellant as claimed and or terminating him as alleged.
28. However, it was pleaded that the respondents engaged the appellant at the sales counter on casual-on-need basis and that he was paid at an agreed hourly rate. It was denied that the parties entered into any formal contract of employment at any time all for a monthly salary of Kshs28,822.10 or at all. It was pleaded that the appellant, while manning the sales counter, paid to himself money irregularly occasioning a stock shortage of Kshs94,792= as counterclaimed by the respondent.
29. It was further pleaded that there was no basis for a claim for house allowance or commuter allowance as the appellant's salary was consolidated.
30. It was pleaded that the respondents did not operate on holidays and thus the claim for unpaid holidays could not stand. It was further pleaded that the appellant was neither entitled to house allowance nor leave allowance as he worked intermittently on casual-need-basis.
31. Both sides called one witness each during the trial. In his testimony in the lower trial court, the appellant stated that he was employed on permanent basis and since he did not work as a cashier, he did not handle any monies that were alleged to have been stolen. He stated that he worked from 7.00 am to 8:00 pm and that he worked continuously from 2017 to 2020 when he was orally dismissed by the respondent's Manager, RW1, for allegedly being a thief.
32. In cross-examination, the appellant stated that he was engaged by the respondent as per a letter dated 1112017 although the said letter did not indicate he was on permanent employment.
33. The respondents called Rodgers M. Ngeyo (RW1), the Branch manager-Bungoma, as a witness. He adopted his filed statement and produced the filed documents as exhibits. He stated that the appellant was engaged by the respondents on 1112017 on casual on need-basis, and that he was paid through petty cash vouchers. He stated that the respondent did not operate during public or other holidays. He stated that the claimant had been warned on various misconducts and received verbal warnings. He stated that in AprilMay 2020 the appellant advanced himself Kshs94,792=, culminating in his termination for a valid reason.
34. In cross-examination, RW1 stated that while the appellant was alleged to have been a thief, there was no report made to the police. He stated that he reported to the head office about the theft and he admitted to dismissing the appellant. He stated that the appellant was paid Kshs800= per week during the period of his engagement.



35. Now, the law in Kenya recognizes several forms of employment based on the period, nature, terms, and conditions of the engagement. As stated in *Krystalline Salt Limited V Kwekwe Mwakele & 67 Others* (2017) eKLR, the *Employment Act* (“the Act”) recognises four major types of employment – contract for specified period of time; contract for unspecified period of time, contract for a specific piece of work or piece-work at a specific piece-rate, and casual employment.
36. The first duty for this court is to determine, based on the evidence on record and the law applicable, the nature and classification of the employment relationship between the appellant and the respondent. As far as the court understands the dispute between the parties and the evidence availed during the trial, the appellant was a sales clerk. Both the appellant and respondent agreed in their respective dispositions that the appellant was engaged from 1st November, 2017 until 15th May, 2020. As far as the records availed and produced by the appellant show, his engagement commenced on 1st November, 2017 as evidenced by the duties and responsibilities letter of even date (see pg. 19 of the record of appeal). The respondents did not call evidence to the contrary.
37. The letter on duties and responsibilities did not indicate the duration of the engagement. In my considered view, the appellant’s employment with the respondent had converted from casual employment to a permanent and pensionable or what is sometimes referred to as regular employee, as was rightly held by the trial court upon expiring of one month based on Section 37(1)(a) of the *Employment Act* (the Act).
38. Section 2 of the Act defines a casual employee as “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.” The appellant was engaged from 2017 to 2020, a period longer than three months and, the court takes the considered view that the employment relationship between the appellant and the respondent was not casual. It was a regular permanent employment relationship.
39. What then is a regular permanent employee entitled to? In *Krystalline Salt Limited V Kwekwe Mwakele & 67 Others* (supra), the Court of Appeal opined that –
- Under section 37 of the *Employment Act*, this court has the power to vary the terms and conditions of service of workers and declare that employees are employed in terms and conditions consistent with the said Act. In this case, the claimants worked continuously for days, which in the aggregate was more than a month, and as such, under Section 37(1) (a), they had become protected by Section 35(1) (c) from arbitrary dismissal. Under Section 31(1) (c), an employee cannot be terminated without prior written notice of 28 days. In this case, therefore, the respondent was barred from terminating the claimant’s employment without a prior written notice of 28 days.
40. The above decision is binding on this court and hence the appellant was before dismissal entitled to notice or pay in lieu thereof, due process, minimum pay, and leave days in pay therefor.
41. In the judgment by the lower trial court (Pg. 150 in the record of appeal) the trial court held that “in this case, the claimant testified that he was employed on 1.11.2017 and was terminated on 15.5.2020. The claimant worked without being stopped at any time. I find that the claimant was a permanent employee.” While the trial court did not state the statutory basis for its finding, in my considered view, the lower trial court arrived at the correct finding that the appellant’s engagement was on permanent basis.



V. Dismissal

42. The basic tenet of the law of evidence does not change and holds true as encapsulated in Section 107 of the *Evidence Act* – that he who alleges must prove. The appellant alleged that he was unlawfully and unfairly dismissed without notice. RW1 confirmed that there was no warning or notice issued, or disciplinary hearing held before the appellant was dismissed. The lower trial court found that the appellant proved that the dismissal was unlawful and the respondent failed to justify the reason(s) and the procedure applied culminating in the dismissal. The respondents violated Sections 41 to 47 of the Act.
43. The respondents asserted that the appellant was dismissed for theft, but no show-cause letter was issued to inform the appellant of the alleged misconduct. The respondents did not take any steps to bring the appellant to appear for a disciplinary hearing on the alleged misconduct and this was confirmed by RW1. Procedural fairness is mandatory even where an employer contemplates summary dismissal for gross misconduct under Section 44 of the Act. The court finds and holds that the respondents failed to adhere to the provisions of Section 41 of the Act before dismissing the appellant.
44. The court finds that the trial court arrived at the right finding that the respondent failed to prove a substantive reason for the appellant’s dismissal and shall thus not interfere with that finding.

V. Reliefs Awarded

45. The lower trial court partially allowed the appellant’s claim. He was awarded three months’ salary in lieu of notice at a salary of Kshs4,000= monthly making a total of Kshs12,000=, compensation for 5 months of Kshs 20,000=, and gratuity for 4 years of Kshs 8,000=. The appellant was also awarded costs.
46. The appellant has challenged the above awards by the lower trial court. The court shall thus consider each of the awards as hereunder.

i. Salary underpayment

47. The appellant pleaded that he was underpaid as he ought to have been receiving Kshs28,822.10 monthly instead of Kshs4,000= that he was paid per month. The court has found above that the appellant’s engagement had converted to regular permanent employment and he was at least entitled to minimum in absence of a higher contractually agreed-upon remuneration.
48. RW1 confirmed that the appellant was engaged from 2017 to 2020 and that he was paid Kshs800= per week through payment vouchers, cumulatively amounting to Kshs3,200= monthly pay. The appellant relied on Regulation of Wages General Amendment Order, 2018 in his submissions before the trial court asserting that he was entitled to a salary of Kshs28,822.10 monthly.
49. The court notes that the claim for underpayment commenced from 1st November, 2017, when the appellant was engaged, until 15th May, 2020 when he was dismissed.
50. The Regulation of Wages (General)Amendment Order, 2018 came into force on 1st May, 2018. At this point, the claimant was already in employment and thus the applicable wage regulation order was the Regulation of Wages (General)Amendment Order, 2017 up to 30th April, 2017. There was no indication by the appellant whether he was engaged within a former municipality or town. The wage order applicable to a salesman in any other area for 2017 was a basic monthly salary of Kshs20,398.55 exclusive of housing allowance. From November 2017 to April 2018, the appellant received Kshs4000 monthly, making his underpayment Kshs16,398.55 per month for 6 months, entitling him to (Kshs16,398.55 *6) Kshs98,391.30= in underpayments.



51. The court has noted that under the Regulation of Wages (General) Amendment Order, 2018 a salesman's salary was Kshs21,418.50 per month. The amount of Kshs28,822.10= referred to by the appellant was payable to a salesman-driver and not to a salesman. The respondents did not adduce proof that he was a salesman driver. The appellant neither pleaded that nor proved that he worked in a former municipality or town and thus the wage applicable by the court ought to have been the rate applicable in other areas. The above wage order applied from 1st May, 2018 to 30th April, 2022. This period is within the period the appellant was in employment of the 2nd respondent from 1st May, 2018 to 15th May, 2020, a period of 24 months and 15 days. The appellant received Kshs4,000= monthly making an underpayment of Kshs17,418.5 per month for 24 months and 15 days. This entitles him to –

*24 months *Kshs17,418.5) =Kshs418,044= plus

* (15days30* Kshs17,418.5) = kshs8,709.25

The cumulative underpayment was thus

*2017 - Kshs98,391.30=

*2018 -(kshs418,044=+ Kshs8,709.25) =426,753.25

Total 525,144.55

52. The conclusion by the lower trial court that although the appellant was underpaid he had negotiated for that salary and had not complained is incorrect in law. The 2nd respondent was obligated under the provisions of the *Labour Institutions Act* 2007, to ensure that the appellant received at least the minimum wage. The court finds and holds that the appellant proved that he was underpaid as above and is awarded Kshs525,144.55 as calculated above.

ii. Salary in lieu of notice

53. The trial court awarded three months' salary in lieu of notice based on the underpaid monthly salary of Kshs4000=. There was no basis for the award of three months' salary in lieu of notice as the appellant had pleaded for one month's salary. The lower trial court found that the dismissal was unfair and based on Section 28 of the Act, the appellant was entitled to one month's salary in lieu of notice. The court has found and held that the appellant was entitled to a monthly salary of Kshs21,418.50 as his last salary and substitutes the trial court' award of Kshs12,000= with Kshs21,418.50 as pay in lieu of notice.

iii. House allowance

54. This court has found that the lower trial court erred in finding that the appellant had consented to the underpayment. The basic minimum salary for November, 2017 to April, 2018 was Kshs20,398.55 exclusive of house allowance.

55. The salary for May, 2018 to May 2020 was Kshs21,418.50 exclusive of house allowance. Under Section 31 of the Act an employee is entitled to housing or house allowance at the rate of 15% of the basic pay.

56. For 2017, the appellant was thus entitled to house allowance as follows –

November, 2017 to April 2018

=Kshs20,398.55 * 15%*6 months =Kshs18,358.70

May, 2018 to 15th May, 2020 (24 months 15 days)

=Kshs21,418.50 *15% * 24months= Kshs77,106.60



=Kshs21,418.50 *15% * 1530= Kshs1,606.39

Total = Kshs78,712.99

Total = (Kshs18,358.70 + 78,712.9) = Kshs97,071.69

57. The lower trial court therefore erred in its finding and award on this issue. The appellant is awarded house allowance of Kshs97,071.69 as tabulated above.

iv. Unpaid holidays for 2017-2020

58. The appellant claimed unpaid holidays falling within 12th December 2017 to 1st May, 2020. RW1 testified that the respondents did not operate on holidays (See Pg.141 of the record of appeal). The lower trial court found and held that the appellant did not prove that he worked on public holidays and dismissed the claim. The court finds that in light of RW1's testimony that it did not operate on holidays the appellant needed to prove that indeed he had worked on public holidays by calling a witness to buttress the evidence for the 2nd respondent that it did not operate on public holidays. The appellant did not call any witnesses to prove that he worked during public holidays. The court shall thus not disturb the finding by the lower trial court.

v. Overtime allowance

59. The appellant pleaded that he was entitled to overtime for five hours worked for 32 months from November, 2017 until he was dismissed. He stated that he worked from 7.00 am to 8.00 pm (see Pg.14 of the record of appeal). The respondent stated that the appellant did not work overtime. The trial court found that the appellant failed to prove this claim. While the respondents did not avail records of the hours worked by the appellant, the court finds that this claim was not specifically pleaded and proved. The appellant ought to have sought a production order if he believed the respondents had in their custody records demonstrating that he worked overtime. The court shall not interfere with the finding and holding of the lower trial court in regard to this issue.

vi. Gratuity

60. The appellant claimed for gratuity for every equivalent to 15 days' salary for the four years worked. The lower trial court awarded what it termed as severance gratuity pay of Kshs8,000= for every 15 days that the appellant worked for the four years. The court finds and holds that the trial lower court misdirected itself in equating and or confusing gratuity and severance pay. Severance pay is only payable in instances of redundancy under Section 40 of the Act while gratuity is only granted if and where the same is agreed upon and or provided for in the contract of service or at the discretion of an employer. The employment relationship between the parties did not entitle the appellant to gratuity. He was not entitled to severance pay as he was summarily dismissed and not declared redundant under Section 40 of the Act. The court therefore, hereby sets aside the award of gratuity by the lower trial court and substitutes the same with nil.

vii. Leave allowance

61. The appellant claimed leave pay for four years. The lower trial court found that the appellant did not prove that he was entitled to leave. The court has found that the appellant was entitled to the benefits available to a regular employee under Section 37 of the Act, and leave is one such benefit. Under Section 28 of the Act every employee is entitled to 21 working days' leave after every twelve consecutive months of service. Between 1st November, 2017 and 15th May, 2020 the appellant had completed only 24 consecutive months (1st November, 2018 and 1st November, 2019) and that entitled



him to a cumulative leave of 42 days at a monthly salary of Kshs21,418.50 that he ought to have been earning were it not for the underpayment during that period.

62. Therefore, the appellant was entitled to leave pay as follows –

$$\text{Kshs}21,418.50 \times 42 = \text{Kshs}29,985.90.$$

viii. Unremitted statutory deductions

63. The appellant prayed for unremitted National Hospital Insurance Fund (NHIF) deductions for 32 months of Kshs16,000- and Kshs12,800= respectively. The two claims were similar save for the amount claimed. The appellant in his submissions before the trial court alleged that his claim of Kshs16,000= related to the NSSF (See Pg.122 of the record of appeal) and he referred to deductions payable to NSSF in the submissions before this court. There is no evidence that the appellant sought to amend his claim to read NSSF before the trial court and thus his claim remained for remittances not made to NHIF.

64. The lower trial court held that the claim was for a statutory deduction that cannot be paid to the appellant. While the trial court arrived at the correct finding, there was no evidence whatsoever that the said amounts were deducted from the appellant to be remitted to NHIF. The appellant did not adduce evidence that indeed there was any deduction from his salary in that regard. In any event, Section 16(6) of the NHIF Act (Cap 255) empowers NHIF to enforce non-remittances and or for non-deductions. This claim is denied and the finding and holding by the lower trial court is upheld.

ix. Compensation damages

65. Having found that the dismissal was unlawful, the appellant was entitled to compensation based on Section 49 of the Act. The lower trial court awarded compensation equivalent to 12 months' salary at the basic pay of Kshs4,000= which this court has found to have been an underpayment. The appellant asserts that he was entitled to compensation equivalent to 12 months' salary under Section 49(i)c & (4) of the Act and further claims to be entitled to compensation equivalent to 32 months' salary which is contradictory.

66. The appellant was, in fact, entitled to compensation at the gross salary that he was expected to have been earning as at his dismissal of Kshs21,418.50.

67. Some of the factors to be considered under Section 49 of the Act are – (a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; (c) the employee's length of service with the employer; (d) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (e) the opportunities available to the employee for securing comparable or suitable employment with another employer; (f) any conduct of the employee which to any extent caused or contributed to the termination; and (g) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.”

68. Compensation is intended to remedy the loss or damage that an employee suffers upon unfair and unlawful termination or dismissal and the same is in the loss of the income or earnings that should have been due and payable to him/her were it not for the termination or dismissal. It is not intended for unjust enrichment. The appellant was dismissed without due process after he had served the respondent for two years six months, and 14 days. He did not state whether he had found another job as at the time of the hearing before the lower trial court.



69. The court finds and holds that the award of four months' salary (Kshs21,418.50. x 4 = Kshs85,674=) is appropriate. The award of Kshs20,000= by the lower trial court is accordingly set aside and substituted with Kshs5,674= as above.

ix. Certificate of service

70. The issuance of a certificate of service should be unconditional under Section 51 of the Act. It is hereby ordered that the same be delivered by the respondents to the appellant's counsel within 30 days of this judgment.

ix. Costs

71. The court shall not interfere with the award of costs by the lower trial court.

72. This appeal therefore partially succeeds. The judgment of Hon. T.M. Olando (PM) delivered on the 9th November, 2023, in Bungoma Chief Magistrate's Court ELRC Cause No. 1 of 2021 between the parties is set aside in terms stated hereinabove as restated hereunder.

V. Costs

73. The appellant is awarded the costs of this appeal.

V. Orders

74. Flowing from the foregoing, the court makes the following orders –

- a. This appeal is partially allowed.
- b. The award of gratuity is hereby set aside.
- c. Judgment be and is hereby entered in favour of the appellant in the sum of Kshs759,296.24 in substitution of Kshs40,000=. The said sum is made of –
 - i. Salary underpayment.....Kshs525,144.55
 - ii. Pay in lieu of notice..... Kshs21,418.50
 - iii. House allowance..... Kshs97,071.69
 - iv. Leave allowance..... Kshs29,985.90
 - v. Compensation for
unlawful termination (Kshs21,418.50 x 4).....Kshs85,674.00
 - Total..... Kshs759.294.64
- d. A certificate of service be issued by the 2nd respondent to the appellant and the same be delivered to the appellant's counsel on record within 30 days of this judgment.
- e. The findings and holdings on unpaid holidays, overtime, unremitted deductions to NHIF, and costs in the lower court shall remain undisturbed.
- f. The appellant is awarded the costs of this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 5TH DAY OF JUNE, 2025.



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DAVID NDERITU
JUDGE

