Supa Festive Limited v Wanjala (Appeal E017 of 2023)
[2025] KEELRC 1685 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1685 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

APPEAL E017 OF 2023

DN NDERITU, J

JUNE 5, 2025

BETWEEN

SUPA FESTIVE LIMITED ..... APPELLANT

AND

JOHN WEKESA WANJALA ..... RESPONDENT

(Being an appeal from the judgment and decree in Bungoma Chief Magistrate's Court ELRC Cause No. 12 of 2021 by Hon. Ezra M. Ayuka (PM) dated and delivered on 6th November, 2023)

JUDGMENT

I. Introduction

1. In a judgment delivered on 6th November, 2023, the lower trial court allowed the respondent's claim with costs and awarded the reliefs as prayed.

2. Dissatisfied with the judgment, the appellant through Chengasia Amurunga & Company Advocates commenced this appeal by way of a memorandum of appeal dated 30th November, 2023 raising the following grounds of appeal –

    1. That the learned trial magistrate erred in law and fact in allowing the respondent's claim for overtime when it was clear that the respondent did not tender or offer any evidence to support the aforesaid claim.

    2. That the learned trial magistrate erred in law and fact in allowing the respondent's claim for over time when it was clear that the respondent did not tender or offer any evidence to support the aforesaid claim.

    3. That the learned trial magistrate erred in law and in fat in failing to take cognizance of the fact that the pleadings and evidence were at variance hence the respondent had not proved his case on the balance of probability as by law required.

4. That the findings of the learned trial magistrate are insupportable in both law and fact

5. That the learned trial magistrate did not fairly analyse the evidence of the appellant vis-a-vis the respondent's evidence before him and his judgement was against the weight of the evidence.

3. The appellant is seeking for the following reliefs –

1. That the appeal herein be allowed.

2. That the judgment of the trial court delivered on the 6th of November, 2023 be set aside in its entirety.

3. That in lieu thereof, the respondent's suit in the subordinate cur be dismissed.

4. That costs of the appeal and in the subordinate court be borne by the respondent.

4. The appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Murunga, filed written submissions on 20th September, 2024. The respondent's counsel, Mr. Juma, filed his submissions on 1st March, 2025.

II. Submissions By Counsel

5. The appellant's counsel condensed his arguments on the grounds of appeal into four issues – Whether the respondent was an employee of the appellant between the year 2016-2018; Whether the respondent is entitled to the overtime and off days allowance sought; Whether the respondent had the power to claim for a refund of funds that were deducted from his pay-slip that were payable to statutory bodies such as NHIF and NSSF but were not remitted to those bodies; and, Whether the trial magistrate erred in law and fact in awarding the respondent the prayer for house allowance despite evidence that the respondent's salary was described as consolidated and therefore allegedly necessarily included the element of house allowance.

6. On the first issue, it is submitted that despite the appellant producing the letter of appointment evidencing that the respondent was employed from 2019 pursuant to Sections 9 and 10 of the *Employment Act* (the Act), the lower trial court disregarded it. It is submitted that the respondent in cross-examination stated that he was employed on 1st January, 2018 (page 8 of the record of appeal) but further stated that he was employed on 4th September, 2018 but was not given a letter of employment (page 82 of the record of appeal). It is submitted that the respondent confirmed that there was no other contract apart from the one adduced by the appellant. It is submitted that the lower trial magistrate failed to ascertain when the respondent began working for the appellant.

7. On the second issue, citing Rogoli Ole Manadiegi v General Cargo Services Limited (2016) eKLR, it is submitted that although the appellant did not avail records of the respondent's working hours, the respondent did not adduce evidence that he had worked overtime.

8. It is submitted that by the appointment letter the respondent's working hours were 8 hours from 7.00 am to 5.00 pm (page 28 of the record of appeal) and for sure the respondent did not work for 18 hours from 1.00 am to 7.00 pm. It is submitted that the dispatch notes adduced by the respondent had no indication (PEX10) of the overtime hours worked by the respondent.

9. Citing Kudheiha Workers v Charles Waithaka Goka T/A Apples Bees Pub and Restaurant (2013) eKLR, it is submitted that the lower trial court failed to analyse whether the respondent was entitled to paid off-days and holidays. It is submitted that working days and hours were as per the contract.

10. Further, citing Charles Nguma Maina V Riley Services Limited (2018) eKLR, it is submitted that the respondent did not adduce evidence of the particular public holidays when he worked or when and how many hours he worked overtime as the dispatch notes did not indicate the hours.

11. It is submitted that pursuant to Section 14 of the *National Social Security Fund Act*, and citing Simiyu v Nzoia Sugar Company Limited (2022) KEELRC 1758 KLR, National Health Insurance Fund (NHIF) and National Social Security Fund (NSSF) are statutory bodies with the powers to recover any unremitted dues. It is submitted that the evidence adduced by the respondent showed that the appellant paid dues to NHIF and NSSF from when the respondent was employed and thus the lower trial court erred in directing the appellant to give the respondent unremitted dues.

12. On the fourth issue, it is submitted that in the letter of appointment the respondent's salary was consolidated. Citing Grain Pro-Kenya Inc Ltd V Andrew Waithaka Kiragu (2019) eKLR, it is submitted that a pay-slip is not a contract of employment and thus since the pay-slip adduced of November, 2019 did not indicate that the respondent received house allowance. The same is not a proof that he was entitled to house allowance.

13. Further, citing Evans Gato Orina v Aggreko International Project Limited (2019) KLR, it is submitted that where a contract states that an employee is entitled to a consolidated salary, such an employee has the burden to prove any allegations to the contrary. It is submitted that the respondent's monthly salary was a consolidated sum of Kshs 21,000/= inclusive of all allowances. It is submitted that he did not adduce any evidence that he was entitled to a house allowance in addition to the consolidated salary.

14. On the other hand, the respondent's counsel submitted on four issues – Whether the respondent was permanently employed or was on a contract; Whether the respondent was underpaid; Whether the respondent was entitled to overtime; and, Whether claimant (respondent) was entitled to salary arrears.

15. On the first issue, it is submitted that the respondent was employed on 4/9/2018 and verbally sacked on 30/11/2020. It is submitted that the letter of appointment (page 27 of the record of appeal) adduced by the appellant was manufactured by the appellant to suit its case, as the respondent only saw the same in court. It is submitted that RW1 conceded that the respondent was engaged on permanent basis (Page 88 of the record of appeal) and thus, as of the year 2018, the respondent was an employee of the appellant.

16. It is submitted that the loading/dispatch documents adduced by the respondent, dated 8th December, 2018 and 1st December, 2018 respectively, bear the respondent's name and the respondent did not allege that they were forged. It is submitted that of importance is the delivery dispatch note dated 24/7/2019 (page 42 of the record of appeal) that confirms that the respondent was on duty on the said date, despite the appellant's assertion that he commenced working on 1st October, 2019.

17. Citing Francis Aboge Oduk v Hasbah Kenya Limited (2020) eKLR, it is submitted that the appellant did not indicate whether the respondent had worked in 2018 on probation and later re-employed on 1st September, 2019.

18. On the second issue, it is submitted that the monthly salary of a salesman within a municipality during the material period was supposed to be Kshs27,023.95 and not Kshs21,000/=.

19. On the third issue, it is submitted that despite the appellant's assertion that the respondent worked from 7.00 am to 5.00 pm, the respondent woke up at 1.00 am and reported to work at 2.00 am. It is submitted that DW1 conceded that the respondent was to report to work at 2.00 am and leave at 1.00 pm, entitling him to overtime pay.

20. On whether the respondent was entitled to salary arrears, it is submitted that the appellant has not challenged the same and hence the award on same should stand.

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 respondent's employment of the respondent by the appellant?

    b. Whether the termination of the respondent was 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 and arrive at own conclusions, but bearing in mind that it neither heard nor recorded the evidence during the trial – See Selle V Associated Motor Boat Co. Ltd (1968) E.A 123.

23. In the lower trial court the respondent's case as per the filed memorandum of claim was that he was employed by the appellant on 4th September, 2018 on permanent basis as a sales clerk earning a monthly salary of Kshs21,000/= (page 1 of the record of appeal).

24. The respondent's witness statement dated 11th January, 2023 (page 52 of the record of appeal) and his further witness statement (page 53 of the record) stated that the respondent was employed on 4th September, 2018. In his testimony during the trial, the respondent testified that he was employed on 4th September, 2018 as a salesman but he was not given a letter of appointment. The lower trial court in its judgment stated that the respondent was employed continuously from 4th September, 2018 until March, 2020 and thereafter dismissed.

25. The respondent produced delivery notes in evidence (No. 908 dated 8th December 2018 and No.1085 dated 1st December 2018) as proof of his employment in 2018 (pages 55 & 56 of the record of appeal). The court has looked at the said delivery notes and, contrary to the respondent's assertion that he was a salesman in 2018, one delivery note indicates that "John Wekesa" was a turnboy, while the second note indicates that "Wekesa" was a turnboy. The respondent's case in the lower trial court was that he was employed as a salesman and not a turnboy.

26. The respondent did not adduce any evidence that he was employed on 4th September, 2018 in that capacity of a salesman. In fact, the delivery notes adduced for the year 2018 are for the month of December and not September. The appellant produced the letter of appointment which indicated that the respondent's employment was effective from 1st October, 2019 to 1st October, 2020. The said letter was adduced before the lower trial court without any objection to its production. The lower trial court's finding that the respondent was employed on 4th September, 2018 was therefore not supported by any evidence.

27. The appellant produced the appointment letter, which the respondent confirmed during cross-examination that he had read and signed on 14th October, 2019. The contract was for a one-year fixed term from 1st October, 2019 to 1st October, 2020 (see page 83 of the record of appeal). The employer is the custodian of employee records under Section 10 of the *Employment Act* (the Act), and the records are deemed accurate in the absence of evidence to the contrary.

28. The assertion by the respondent that he worked in 2018 is based on two dispatch/delivery notes. There is no evidence that he worked on 4th September 2018. Delivery notes are certainly not proof of employment. On a balance of probabilities, the appellant's records, including the letter of appointment, was unrebutted on when the respondent commenced his employment on a one-year fixed-term contract in the absence of evidence that the respondent was engaged in September, 2018 as a salesman. The respondent's employment commenced on 1st October, 2019 as per the letter of appointment. The court, therefore, finds and holds that the lower trial court failed and erred for not scrutinizing the evidence adduced and thus arrived at the wrong decision that the respondent had been employed on 4th September, 2018. That holding cannot stand and is hence set aside.

V. Dismissal

29. As per his pleadings filed and evidence adduced in the lower trial court, the respondent's case is that on 15th March, 2020 the appellant's human resources manager verbally informed him to stay at home until he was recalled. He pleaded that he was called to report back on 30th November, 2020 when he was informed by the human resources manager that he had been dismissed. He pleaded that he demanded for reasons for his dismissal but none was forthcoming.

30. It is on the basis of the foregoing that the appellant prayed for the following reliefs in the lower trial court –

    i. Declaration be made that the claimant was unlawfully sacked from his employment.

    ii. The claimant was permanently and penetrably employed.

    iii. Make a declaration that the claimant's services were unprocedurally unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensations of his terminal dues as outlined above.

    iv. The respondent do pay a sum of Kshs2,833,597/- herein as particularized in paragraph 16,17,18,19 & 20 of the memorandum of claim and he also pray for certificate of service.

        i. One month's salary in lieu of notice.....Kshs27,023/=

        ii. Compensation (12 months) Kshs324,287.40

        iii. Salary underpayment (36 months) Kshs216,862.20

        iv. Unpaid holidays..... Kshs22,083/=

        v. Unremitted NSSF funds..... Kshs20,000/=

        vi. Unremitted NHIF funds.....Kshs19,500/=

        vii. Overtime allowance..... ...Kshs1,956,150/=

        viii. Unpaid salary(1/3/2019-May/2019).....Kshs81,072/=

        ix. Security deductions.....Kshs14,000/=

x. Off days (Nov/2018-March,2020) .... Kshs87,498/=

xi. Unpaid leave.....Kshs36,416.96

xii. Unpaid house allowance.....Kshs12,160.80

v. Costs of this suit.

vi. Interest in(i) and(ii) above.

vii. Certificate of service.

viii. Any other reliefs as the court may deem just.

31. In its memorandum of response to the claim, the appellant stated that the respondent was engaged on October, 2019 on a one-year contract as a salesman at an agreed monthly gross salary of Kshs21,000/=.

32. The appellant pleaded that in July, 2020 the respondent absconded and did not report back to work. It was pleaded that the respondent left work on his own volition and hence the respondent did not dismiss him (pages 23 and 24 of the Record of Appeal). Bernard Mutua Nzoka (RW1), the general manager, adopted his filed statement and produced the filed documents as exhibits. He stated that the respondent was employed in 2019 on a contract that was renewable yearly. He stated that the respondent absconded duty and was not dismissed as he alleged. He testified that even during the COVID -19 pandemic in 2020 no salesman was stopped from working.

Substantive Fairness

33. On substantive fairness, the respondent submitted that his termination was unfair as no reason was offered for his termination.

34. During the trial, RW1 stated that the respondent absconded duty. He testified that no disciplinary proceedings were taken against the respondent as calls to the respondent went unanswered.

35. The court has perused the memorandum of claim dated 14th September, 2021 wherein the respondent alleges that when he was sent on leave on 15th March, 2020 he was informed that he would receive his salary only to be called back on 30th November, 2020 and dismissed. As of 30th November, 2020 the respondent's contract had lapsed by effluxion of time on 1st October, 2020.

36. The respondent has not stated that he was not paid during the said period from March to November, 2020. On the other hand, the appellant stated that the respondent absconded duty in July, 2020.

37. What this court is invited to determine is whether the dismissal, if any, met the reasonable test, as enumerated by Lord Denning in British Leyland UK Limited v Swift (1981) I.R.L.R. 91, where it was held that –

> The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably takes a different view.

38. The respondent asserts that he was given no reason for his alleged dismissal. The appellant asserts that the respondent absconded duty. Pursuant to Section 43(1) of the Act, an employer is obligated to give the reasons for the termination or dismissal. As rightly stated in Josephine M. Ndungu & others v

Plan International Inc (2019) eKLR, "68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements"

39. Although the appellant argues that the respondent absconded duty, there was no show-cause letter issued or proof of any efforts made by the appellant to trace or contact the respondent. The appellant did not take any steps to bring the respondent to appear for a disciplinary hearing on the alleged misconduct. The respondent remained an employee of the appellant and the appellant was obligated to ensure that the respondent was accorded a fair hearing prior to the dismissal. RW1 confirmed that indeed no disciplinary action was brought against the respondent.

40. The court finds and holds that the lower trial court arrived at the proper finding in that the appellant failed to prove a substantive reason(s) for the dismissal and shall thus not interfere with that finding and holding.

Procedural Fairness

41. The respondent challenged the procedure applied in his dismissal for non-compliance with the provisions of Section 41 of the Act. Through RW1 the appellant conceded that no disciplinary proceedings were undertaken.

42. Procedural fairness is obligatory even in the event that the employer contemplates summary dismissal for gross misconduct under section 44 of the Act. The procedural fairness for gross misconduct is defined in Section 41(2) of the Act to wit –

> 41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.' (Emphasis Added)

43. The court finds and holds that the appellant failed to comply with Section 41 of the Act before the dismissal of the respondent. The court upholds the finding by the lower trial court.

VI. Reliefs Awarded

44. The lower trial court found and held that the respondent's claim had merit and allowed the same as pleaded. However, the lower trial court failed to consider and address each relief specifically and issued blanket awards. The court shall thus consider each of the reliefs pleaded and awarded and determine whether the respondent was entitled to each award and whether the lower trial court served justice.

Underpayments

45. The respondent pleaded that he was underpaid as he ought to have earned Kshs27,023.95 monthly instead of the Kshs21,000/= paid. The court has found and held that the respondent's letter of appointment for a three-year contract-term effective from 1st October, 2019 was the basis that set out the terms and conditions of employment between the appellant (employer) and the respondent (employee).

46. The respondent in his submissions before the trial court alleged that he as a salesman he was entitled to a monthly salary of Kshs27,023.95. There was no indication of which wage regulation or declaration the respondent relied on. The court noted that in the Regulation of Wages (General)Amendment Order, 2018 a salesman was to earn Kshs21,418.50. The amount of Kshs27,023.95 referred to by the respondent was for a salesman-driver and not a salesman. The respondent did not adduce evidence that he was a salesman-driver. It therefore means that the respondent's underpayment as per the contract could only have been Kshs418.50 monthly. The underpayment can only be for the duration covered in the contract for 36 months equivalent to three years.

47. In the circumstances the amount payable to the respondent based on the months worked from October, 2019 to March, 2020 is Kshs418.50 x 36 months = This is the amount due and payable to the respondent and the award of Kshs2,511/= by the lower trial court is hereby set aside and replaced with Kshs15,066.

Salary in lieu of notice

48. The court has upheld the lower trial court's finding and holding that the respondent's termination was unfair and unlawful. The respondent was thus entitled to one month's pay in lieu of notice. The respondent was supposed to be earning a salary of Kshs21,418.50 as noted above. The respondent was thus entitled to the above sum and the award of Kshs21,000/= by the lower trial court is set aside and therefor substituted Kshs21,418.50.

House allowance

49. The respondent's letter of appointment states that his salary was a consolidated at Kshs21,000/=. In his testimony during the trial he conceded that he read, understood, and signed the contract (page 83 of the record of appeal). Under the Regulation of Wages (General)Amendment Order, 2018 applicable in 2020, the respondent was entitled to a house allowance. However, the contract between the parties is clear that the salary was consolidated confirming that it comprised of the basic pay and all the allowances. In any event, the underpayments have been taken care of above. The award by the lower trial court is hereby set aside.

Unpaid holidays for 2018

50. The respondent claimed unpaid holidays from 12th, 25th & 26th December, 2018, Good Friday, Easter Monday, and Eid al-Fitr, 2018. The court has found that the respondent did not prove that he was employed in 2018. The court finds that the lower trial court erred in awarding the same and the said award is hereby set aside.

Double salary -Unpaid holidays for 2019

51. The respondent claimed a double salary of kshs14,289/= for 2019 in unpaid holidays. The court has found that the respondent's contract commenced on 1st October, 2019. There was no basis for the respondent's claim for a double salary and no particulars were given on how he arrived at the said calculation. Although the appellant did not avail records showing whether the respondent had worked during holidays as required under Section 10 and 74 of the Act, there was no basis for the respondent claiming the double salary. However, the respondent was entitled to overtime for the holidays of 10/10/2019, 20/10/2019, 12/12/2019, 25/12/2019, and 26/12/2019 amounting to Kshs1,299/= per day for five days making a total of Ksh6,495/=.

52. The claim for Good Friday, Easter Monday, Eid al-Fitr, Labour Day, and Madaraka Day, 2019 could not stand as the respondent's contract had not commenced as the said holidays fall within March, May, and June each year. The respondent's contract commenced on 1st October, 2019. The claim for those five days fails and the award therefor is set aside.

Unremitted NSSF and NHIF deductions

53. The respondent claimed unremitted NSSF and NHIF deductions for the period from November, 2018 to December, 2020. The Court shall not grant prayers for refund of those statutory deductions payable to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) deductions. The respondent ought to pursue enforcement with the NSSF & NHIF under the statutory mechanism provided for under the statutory instruments that govern the said statutory bodies.

Overtime allowance

54. The respondent pleaded that he worked for 10 extra hours per day alleging that he worked from 1.00 am to 7.00 pm, that is 18 hours instead of 8 hours. The overtime was for 2018 twice and the year 2020. RW1 testified that the respondent worked for 8 hours from 2.00 am to 10.00 am because the appellant supplied and delivered bread to Kapenguria and Lake Victoria. The contract by the appellant stated that the working hours were between 7.00 am to 5.00 p.m. The appellant did not adduce records of the hours that the respondent worked. Further, the court found that there was no proof that the respondent had worked for the appellant in 2018. Moreover, the respondent pleaded for 365 days in 2018, yet he pleaded that he had been employed on 4th September, 2018, a period for less than 365 days. As for the 75 days claimed for overtime in 2020, there was no mention of the period when the overtime accrued. The respondent simply claimed 75 days which was not specific for a claim that ought to be specifically pleaded and proved. The award is set aside.

Unpaid salary from 1st March, 2019 to May 2019

55. The respondent further claimed that he was not paid a salary between 1st March, 2019 to May, 2019. The court found and held above that the evidence on record indicates that he was employed as from 1st October, 2019. There is no evidence whatsoever that the respondent worked for the period relating to this claim. The award by the lower trial court is thus set aside.

Deducted Security fees

56. The respondent claimed that he was deducted Kshs2,000/= monthly from September, 2019 to March, 2020 as security, totaling Kshs14,000/=. However, the respondent only produced one receipt of 30th November, 2019 (page 21 of the record of appeal) being payment for a security deposit for November, 2019. The same deduction was also indicated on the pay slip of November, 2019, adduced by the appellant (page 22 of the record of appeal). The appellant did not rebut the claim that the said sum was deducted and no explanation was offered as to why the same should not be refunded. The court finds that the respondent proved that only a sum of kshs2,000/= was deducted and not the claimed sum of Kshs12,000/=. The other statement and receipt on the security amount adduced by the respondent belonged to Milton Simiyu (CW2) (See pages 58 & 61 of the record of appeal). In the circumstances the court awards only Khs2000/= and the award of Kshs12,000/= by the lower trial court is hereby set aside.

Off days

57. The respondent alleged that he was entitled to one day-off per week from November, 2018 to March, 2020 as follows – 8 weeks in 2018; 48 weeks in 2019; and 12 weeks in 2020.

58. The appellant did not avail records to demonstrate that the respondent took the off-days. However, the respondent only worked from November 2019 to March 2020. That is about five months equivalent to 20 weeks. He was therefore entitled to 20 days pay for off-days during that period calculated as Kshs21,418.50/30 x 20 = Kshs14,279/=.

Unpaid leave

59. Section 28 of the Act provides that an employee is entitled to 21 working days' leave after every twelve consecutive months of service. The respondent was not entitled to annual leave as he did not work for 12 consecutive months. The respondent pleaded that he stopped working in March 2020 and had started from October, 2019. He therefore only worked for 5 months and 14 days. The award thus is set aside.

Compensation

60. Having found and held that the dismissal was unlawful, the respondent was entitled to compensation under Section 49 of the Act. The trial court awarded compensation globally but did not state why the respondent was entitled to the maximum compensation of twelve month's salary under Section 49 of the Act.

61. 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;

    (e) the employee's length of service with the employer;

    (f) 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;

    (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

    (k) any conduct of the employee which to any extent caused or contributed to the termination; and

    (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination."

62. Compensation is intended to remedy the loss or damage that an employee suffers upon unfair and unlawful termination or dismissal 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 undue enrichment. The respondent testified that he was stopped from working on 15th March, 2020. He had worked for just about six months as per the contract that commenced on 1st October, 2019. He did not testify on whether he had found another job as at the time of the hearing before the trial court. The court finds that the award of the maximum compensation was excessive considering that the respondent had only worked for five months. Further, the court finds that an award of six months of the respondent's last lawful gross pay of Kshs21,418.50 x 3 = Kshs64,255.50 is appropriate compensation

and substitutes the same for the award of Kshs568,173.55/= by the lower trial court. This award by the lower trial court is hereby set aside.

Certificate of service

63. The trial court allowed the award of a certificate of service but did not state the same explicitly. The issuance of the same is unconditional under Section 51 of the Act and should be delivered by the appellant to the respondent's counsel within 30 days of this judgment.

Costs

64. The court shall not interfere with the award of costs by the trial court. The respondent is awarded costs of the trial in the lower trial court.

65. The appeal dated 30th November, 2023 partially succeeds in the terms of the foregoing findings and holdings.

VII. Costs

65. The court orders that each party shall meet own costs for this appeal.

VIII. Orders

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

a. The appeal is partially allowed.

b. The claims of salary underpayment, house allowance, unpaid holidays-2018 & 2019(part) double salary; unremitted NSSF and NHIF deductions; overtime allowance; off days; unpaid salary; and unpaid Leave are hereby set aside.

c. Judgment be and is hereby entered in favour of the respondent in the sum of Kshs123,514/= in substitution of Kshs3,005,079/=. The said sum is made of –

i. Pay in lieu of notice.....Kshs21,418.50

ii. Underpayments.....Kshs15,066/=

iii. Unpaid public holidays-2019(Kshs1295 x 5days)

.....Kshs6,495/=

iv. Security Deposit.....Kshs2,000/=

v. 0ff days .....Kshs.14,279/=

vi. Compensation for unlawful

termination (Kshs21,418.50 x 3).....Kshs64,255.50

Total .....Kshs123,514/=

d. Certificate of service be issued by the appellant to the respondent and the same be delivered to his counsel on record within 30 days of this judgment.

e. The award of costs to the respondent in the lower trial court shall remain undisturbed.

f. Each party shall meet own costs for this appeal.

CONCLUSIONS.

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

.....

DAVID NDERITU

JUDGE