



**Sumbati v Aqua Plumbing Company Limited (Appeal E032 of 2025)
[2025] KEELRC 2022 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E032 OF 2025**

**JW KELI, J
JULY 4, 2025**

BETWEEN

GODFREY SIMIYU SUMBATI APPELLANT

AND

AQUA PLUMBING COMPANY LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. L. Ambasi, Chief Magistrate delivered on the 18th of December 2024 in NAIROBI MCELRC No. E077 of 2023)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. L. Ambasi, Chief Magistrate delivered on the 18th of December 2024 in Nairobi MCELRC No. E077 of 2023 between the parties filed a memorandum of appeal dated the 31st of January 2025 seeking the following orders:-
 - a. This Appeal be allowed, the decision of the learned Magistrate be partly set aside, overturned and or reversed and this Honourable Court be pleased to substitute with an Order that the Appellants suit in the Lower Court be allowed for further prayers of;
 1. The Honourable Court awards the Appellant Kshs.32,369.74/=being one month pay in lieu of notice.
 2. The Honourable Court awards the Appellant Kshs.97,109.22/=being compensation equivalent to three months' salary for unlawful termination.
 3. The Honourable Court awards the Appellant Kshs.6,27300/= on account of unpaid 10salary arrears.
 4. The Honourable Court awards the Appellant Kshs. 653,313.60/=on account of salary underpayments.



5. The Honourable Court awards the Appellant Kshs. 48,717/= being accumulated severance pay.
6. The Honourable Court awards the Appellant Kshs. 56,295.20/=being compensation for unpaid amount for leave not granted.
7. The Honourable Court awards the Appellant Kshs.3,300.00/=being compensation for leave travelling allowance.
8. The Honourable Court awards the Appellant interest on the total
9. Cost of this Appeal to be borne by the Respondent.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law by proceeding under the wrong principles of Employment and Labour Laws.
3. The Honourable Magistrate erred in law and fact by failing to properly consider sections 9,10,20 and 74 of the Employment Act that touch on the responsibility of the Employer to keep and produce Employment records.
4. The Honourable Magistrate erred both in law and fact by failing to consider section 25 of the Employment Act that requires an employer to pay any remuneration wrongfully withheld or wrongfully deducted from an employee. The learned magistrate further failed to appreciate that the complaint under section 25 of the employment Act needs to be lodged not later than three years after the alleged unlawful deduction has been made.
5. The Honourable Magistrate in law and fact by failing to properly consider section 40 of the Employment Act that touches on redundancy despite having found that the termination of the Appellant's employment was both procedurally and substantively unlawful.
6. The Honourable Magistrate erred in law and fact by failing to properly consider section 90 of the Employment Act that touch on limitations and finding that the claim for underpayment, salary arrears, unpaid leave days and leave travelling allowance accrued monthly and constituted continuous injuries.
7. The Honourable Magistrate erred in law by failing to consider the regulation of wages (general) (amendment)order 2018 which stipulates a minimum monthly salary of Kshs.28,147.60/=exclusive of housing allowance for a care taker.
8. The Honourable Magistrate erred in law and fact by failing to reach a finding that the Claimant's salary of Kshs. 10,000/= was below the one stipulated under the regulation of wages (general) (amendment)order 2018.
9. The Honourable Magistrate erred in law and fact by failing to appreciate that some of the clauses in the Claimant appointment letter were contrary to the law. The learned magistrate failed to appreciate that a contract cannot be used as an estoppel where there is an express statutory provision. The learned magistrate further failed to appreciate the fact that the minimum wage provision was promulgated to prevent exploitation of worker.
10. The Honourable Magistrate erred both in law and fact by making an award in favour of the Appellant for the sum of Kshs. 30,000/= instead of Kshs.97,109.22/= ostensibly on account of compensation equivalent to three months' compensation for unlawful termination. The learned Magistrate failed to



consider the fact that the minimum wage for a care taker is Kshs. 28,147.60/= exclusive of housing allowance while making the award.

11. The Honourable Magistrate erred both in law and fact by awarding in favour of the Appellant the sum of Kshs. 10,000/= instead of Kshs. 32,369.74/= ostensibly on account of one month pay in lieu of Notice for unlawful termination. The learned Magistrate failed to consider the provisions of the Regulation of wages while making the award.
12. The Honourable Magistrate erred both in law and fact by awarding in favour of the Appellant the sum of Kshs. 15,000/= instead of Kshs. 48,717/= on account of severance pay. The learned Magistrate failed to consider the provisions of Section 40(1)(g) of the *Employment Act* and minimum wage order while tabulating the award.
13. 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. 653,313.60/= on account of underpayments despite the overwhelming evidence and testimony by the Appellant that he worked as a care taker at a monthly salary of Kshs. 9,000/= which was later increased to Kshs. 10,000/=. The learned magistrate erred in law and fact by finding that the claim of underpayment accrued at the end of each month and that the Claimant should have moved the court within twelve months.
14. 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. 6,273.00/= on account of unpaid salary arrears. The learned magistrate erred in law and fact by failing to find that this is money wrongfully withheld by the Respondent which was contrary to section 25 of the *Employment Act*.
15. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for unpaid leave days and leave travelling allowance accrued on account that the same accrued monthly and constituted continuing injury.
16. 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 indicate the various deconsolidated benefits that was offered to the Appellant as such arriving to a wrong conclusion of the awards that the Appellant was entitled.
17. The Honourable Magistrate erred in law and fact by failing to apply the law and appreciate the correct evidence adduced and tendered in Court.
18. The Honourable Magistrate misdirected himself in his analysis, evaluation, interpretation and assessment of the entire evidence tendered by the Appellant/Claimant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.

Background To The Appeal

19. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 16th of January 2023 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 Respondent has been underpaying the Claimant for the entire duration of service.
 - d. A declaration that the Claimant is entitled to his employment benefits even upon termination of his services by the Respondent.



- e. Maximum compensation for wrongful termination.
- f) Special damages
 - I. Unpaid Salary Ksh.6,273.00
 - II. One month pay in lieu of Notice Ksh.32,369.74
 - III. Underpayments Ksh.653,313.60
 - Iv. Damages for wrongful dismissal Ksh.388,436.88
 - v. Severance Ksh.48,717.00
 - vI. Unpaid amount for leave not taken Ksh.56,295.20
 - vII Leave Travelling allowance Ksh.3,300.00
 - Total Ksh.1,188,705.42
- g) Interest on the total.
- h) Certificate of Service.
- i) Costs of the Cause.
- j) Any further relief this Honourable Court may deem fit and just to award under the circumstances.

(see pages 11-17 of the ROA dated the 10th of February 2025)

- 20. The Appellant also filed his verifying affidavit, list of witnesses, witness statement and list of documents all dated the 16th of January 2023 (pages 18-43 of ROA).
- 21. The claim was opposed by the Respondent who entered appearance and filed a memorandum of response dated 16th of June 2023 (pages 45-46 of ROA). They also filed a witness statement of Rosemary Irungu (page 47 of ROA).
- 22. The Claimant's/Appellant's case was heard on the 28th of February 2024, 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. Owuor (pages 127-129 of ROA).
- 23. The Respondent's case was heard on the 7th of March 2024, when the witness for the Respondent testified in the case relying on her witness statement, produced their documents, and was cross-examined by counsel for the Appellant, Mr. Magonda (pages 129-131 of ROA).
- 24. The parties took directions on filing of written submissions after the hearing. The parties complied.
- 25. The Trial Magistrate Court delivered judgment on the 18th of December 2025 partly allowing the Claimant's claim and awarding him the sum of Kshs. 55,000/- comprised of one month's pay in lieu of notice, three month's salary as compensation, and severance pay (Judgment at pages 120-124 of ROA).

Determination

- 26. The appeal was canvassed by way of written submissions. Both parties filed.
- 27. 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."

28. 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

29. In his submissions dated the 22nd of April 2025, the Appellant identified the following issues for determination:
- i. Whether the award of one-month salary in lieu of notice, compensation and severance pay was to be awarded basing on the provisions of minimum wage order.
 - ii. Who will bear the cost of the Appeal.
30. On their part, the Respondent identified the following issues for determination in their submissions dated the 24th of April 2025:
- i. Whether the Appeal is time-barred and should be struck out.
 - ii. Whether the lower court correctly calculated terminal dues based on the Appellant's last monthly salary.
 - iii. Who should bear the costs of the Appeal
31. The court finds that the issueS for determination in the appeal to be as follows:-Whether the appeal is properWhether the lower court correctly calculated terminal dues based on the Appellant's last monthly salary.

Whether the appeal is proper

32. The Respondent submitted that the appeal was statute time-barred as judgment was delivered on the 18th December 2024 yet the appeal was filed on 4th February 2025 48 days later, 18 days, beyond the 30 days statutory window. The respondent invoked rules of the court, Rule 12(2) of the Employment and Labour Relations Court(Procedure) Rules, 2024 which states- '12 (2) Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.'"The appellant did not submit on the issue perhaps because it was not raised at any stage before submissions. It was a true fact that the impugned judgment was delivered on the 18th December 2024 and the appeal dated 31st January 2025 filed 4th February 2025. When time does not run [Order 50, rule 4 of the Civil



Procedure Rules.], ‘Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.’ Section 79 G of the Civil Procedure Act states: -‘79G. Time for filing appeals from subordinate courts. Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.’ The judgment appealed against was delivered on the 18th December 2024. Time stopped running 20th December 2024 as per Order 50 rule 4 of the Civil Procedure Rules (supra). Applying the foregoing Rule on when time stops running, the appeal ought to have been on or before 8th February 2025. The appeal was filed on 4th February 2025 thus valid due to the stopping of time between 21st December and 13th January, both days inclusive. Whether the lower court correctly calculated terminal dues based on the Appellant’s last monthly salary.

33. The relevant grounds of appeal were-

- a. The Honourable Magistrate erred in law by failing to consider the regulation of wages (general) (amendment) order 2018 which stipulates a minimum monthly salary of Kshs.28,147.60/= exclusive of housing allowance for a care taker.
- b. The Honourable Magistrate erred in law and fact by failing to reach a finding that the Claimant’s salary of Kshs. 10,000/= was below the one stipulated under the regulation of wages (general)(amendment) order 2018.
- c. The Honourable Magistrate erred in law and fact by failing to appreciate that some of the clauses in the Claimant appointment letter were contrary to the law. The learned magistrate failed to appreciate that a contract cannot be used as an estoppel where there is an express statutory provision. The learned magistrate further failed to appreciate the fact that the minimum wage provision was promulgated to prevent exploitation of worker.
- d. The Honourable Magistrate erred both in law and fact by making an award in favour of the Appellant for the sum of Kshs. 30,000/= instead of Kshs.97,109.22/= ostensibly on account of compensation equivalent to three months’ compensation for unlawful termination. The learned Magistrate failed to consider the fact that the minimum wage for a care taker is Kshs. 28,147.60/= exclusive of housing allowance while making the award.
- e. The Honourable Magistrate erred both in law and fact by awarding in favour of the Appellant the sum of Kshs. 10,000/= instead of Kshs. 32,369.74/= ostensibly on account of one month pay in lieu of Notice for unlawful termination. The learned Magistrate failed to consider the provisions of the Regulation of wages while making the award.
- f. The Honourable Magistrate erred both in law and fact by awarding in favour of the Appellant the sum of Kshs. 15,000/= instead of Kshs. 48,717/= on account of severance pay. The learned Magistrate failed to consider the provisions of Section 40(1)(g) of the Employment Act and minimum wage order while tabulating the award.
- h. 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. 653,313.60/= on account of underpayments despite



the overwhelming evidence and testimony by the Appellant that he worked as a care taker at a monthly salary of Kshs.9,000/= which was later increased to Kshs. 10,000/=. The learned magistrate erred in law and fact by finding that the claim of underpayment accrued at the end of each month and that the Claimant should have moved the court within twelve months.

- g. 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. 6,273.00/=on account of unpaid salary arrears. The learned magistrate erred in law and fact by failing to find that this is money wrongfully withheld by the Respondent which was contrary to section 25 of the [Employment Act](#).

Appellant submissions

34. One month salary in lieu of notice- The Appellant's case is that the one month salary in lieu of notice was to be awarded at Kshs. 32,369.74/=. The court reached a determination that there was no evidence that the Appellant was given a redundancy notice and awarded him Kshs. 10,000/=.The Appellants salary was contrary to the provisions of the minimum wage order. He was paid a salary of Kshs. 9,000/= per month which was increased to Kshs. 10,000/=. On 1st May 2018, the Regulation of wages (General) (Amendment) order 2018 came into force. The order provides for the minimum salary of a care taker to be Kshs. 28,147.60/= exclusive of housing allowance. The [Labour Institutions Act](#) No. 12 of 2007 provides that an employee is entitled to housing or housing allowance at the rate of 15%, this being a minimum of Kshs. 4,222.14/= housing allowance for a care taker. The total minimum salary for a care taker inclusive of housing allowance as per the minimum wage is Kshs. 32,369.74/=. The law was promulgated to safe guard employees from exploitation; the law of contract or estoppel is not applicable in preventing the Appellant from being awarded based on the minimum wage order. The consideration of the contract clause was illegal as it was contrary to the law. The appellant urged the court to vary the award from Kshs. 10,000/= to Kshs. 32,369.74.
35. Compensation -The Appellant's case is that his compensation was to be based on the minimum wage of Kshs. 32,369.74/=. He was awarded a 3 months compensation of Kshs. 30,000/=. This compensation was based on the gross monthly salary of Kshs. 10,000/= which salary was below the minimum wage. The award of compensation failed to consider the fact that the minimum wage for care taker is Kshs. 28,147.60/= exclusive of housing allowance. The appellant urged the court to vary the award from Kshs. 30,000/= to Kshs. 97,109.22/= .
36. Severance pay -The Appellant was awarded Kshs 15,000/=. It was his case that the sale of 3rd Parklands Highridge property to Kings Collection Company rendered him redundant. He had worked for three years and four months. This award was as per the provisions of section 40 (1)(g) of the [Employment Act](#) however it failed to take into consideration the minimum wage order provisions. That the learned Magistrate erred in law by awarding in favour of the Appellant the sum of Kshs. 15,000/= instead of Kshs. 48,717/= on account of severance pay. It is the Appellant case that the severance was to be accessed using the minimum wage rates.

Respondent's submissions

37. The trial court rightly applied the Appellant's actual salary of KES 10,000/=:, and not the minimum wage. The award of three months' salary (KES 30,000/=) aligns with the discretion granted under Section 49(1)(c) of the [Employment Act](#). The award of KES 10,000/= in lieu of notice is consistent with Section 40(1)(f) of the [Employment Act](#). 13. Section 40(1)(g) of the [Employment Act](#) provides for severance at 15 days' pay for every completed year of service. The Appellant served for 3 years: 15 days * 3 years × KES 10,000 ÷ 30 = KES 15,000/= . The trial Court's finding to use the Appellant's actual salary of KES 10,000/= as the basis for calculating compensation for unlawful termination, one



month's salary in lieu of notice and severance pay reflects the approach adopted in *Phanice Ayoma Seru v Chemsolve Cleaning Service Ltd* [2018] KEELRC 626 (KLR), where similar awards were computed using the employee's actual salary after the court rejected the employee's claim for underpayments.

Decision

38. The trial court at paragraph 27 stated as follows as concerns the Wages Order-The Claimant claimed that he should have been paid a salary of Kshs 32,369.74 inclusive of house allowance according to the Regulation of Wages (General) (Amendment) Order 2018, and he claimed underpayments, salary arrears for September 2020, unpaid leave and leave travelling allowance. It is not in dispute that the Claimants separated with the Respondent on 25th September 2020, and that they moved the Court on 16 January 2023, more than 12 months after cessation of employment. The trial court did not apply the wages orders despite acknowledging it in the judgment. The appellant submitted on the minimum wages before the trial court (pages 57-60 of ROA).The relevant wages order was produced before the trial court (page 38 of the ROA). At paragraph 15 of the judgment the trial court stated that the claimant proved he was employed by the Respondent as a caretaker. There is no cross-appeal. It is illegal for an employer to pay an employee less than the prescribed minimum wages. Section 3 of the General Wages Order (amendment) Act states:-

'3. Basic minimum wage

- (1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First or Second Schedule, having regard to his age and to the circumstances of his employment by reference to columns 2, 3 and 4 thereof and to the nature of his occupation, as listed in column 1 thereof to be determined by reference to the definitions contained in the Third Schedule.
- (2) An employer shall ascertain the basic minimum wage to which any person employed by him is entitled under the provisions of this Order by reference to the particulars of his birth or apparent”(emphasis given)

39. The Respondent relied on the decision in *Phanice Ayoma Seru v Chemsolve Cleaning Service Ltd* [2018] KEELRC 626 (KLR) where the claim of underpayment was raised. The Judge held, ‘c) The Court finds that the claims and prayers for leave travelling allowance; salary underpayments and weekdays overtime for the 9 years of service were in the nature of continuing injury whose cause of action accrued upon their cessation on 11.06.2013. Twelve months for the cause of action as per section 90 of the *Employment Act*, 2007, lapsed on or about 10.06.2014 and the suit was filed belatedly on 23.12.2014. The claims and prayers in that regard will fail as time barred.” The Judge then after the finding, applied the last monthly pay and not the minimum wages . The claim for underpayment by the appellant expired 12 months post the termination and that would affect any due awards by the court. I am persuaded by the said decision *Phanice Ayoma Seru v Chemsolve Cleaning Service Ltd* [2018] KEELRC 626 (KLR) which has not been overturned by a higher court to uphold the application of the last salary paid to the Appellant by the trial court.

Conclusion

40. Consequently, as the appeal is hinged on the non –non-application of the minimum wages order by the trial court, the appeal fails. Taking into account the nature of the appeal and the fact that the trial court did not explain why it did not apply the minimum wage, the court in the matter finds it is fair to order each party to bear own costs in the appeal. The court upheld judgment of judgment and decree



of Hon. L. Ambasi, Chief Magistrate delivered on the 18th of December 2024 in Nairobi MCELRC No. E077 of 2023.

41. Stay of execution of 30 days is granted.

42. The file is marked as closed.

43. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Magonda

Respondent: Owuor

