



REPUBLIC OF KENYA



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**Wanyama v Malava Financial Services Association (Employment and Labour Relations Appeal E008 of 2023) [2024] KEELRC 1014 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1014 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2023**

**JW KELI, J**

**APRIL 16, 2024**

**BETWEEN**

**ANNE NAMBANE WANYAMA ..... APPELLANT**

**AND**

**MALAVA FINANCIAL SERVICES ASSOCIATION ..... RESPONDENT**

*(An Appeal from the Judgment of Hon. R. S. Kipngeno (SPM), Butali, delivered on 3rd October 2023 in Butali PMCELR case No. 1 of 2022)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment of Hon. R. S. Kipngeno (SPM), Butali, delivered on 3<sup>rd</sup> October 2023 in Butali PMCELR case No. 1 of 2022 Between Anne Nambane Wanyama and Malava Financial Services Association filed a Memorandum of Appeal dated 31<sup>st</sup> October 2023 and Record of Appeal received in Court on the 21<sup>st</sup> December 2023, seeking the following orders: -
  - a. The aforesaid Judgement delivered on 3<sup>rd</sup> October 2023 dismissing the Appellant's claim and allowing the Respondent's counterclaim be set aside and substituted with Judgment allowing the Appellant's claim and dismissing the Respondent's counter claim with costs.
2. The Appeal was premised on the following grounds that:-
  1. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant absconded duty despite the Respondent's admission that the Appellant was suspended from duty.
  2. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant possessed no specialized training as against the evidence on record.
  3. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant's dismissal was fair and lawful.



4. The Learned Trial Magistrate erred in law and in facts in allowing the counter-claim without considering the evidence on record.
  5. The Learned Trial Magistrate erred in law and in failing to appreciate the applicable law.
  6. The Learned Trial Magistrate erred in law and in fact failing to appreciate the facts and circumstances of the matter before the court and the submissions made on behalf of the Appellant hence arriving at an erroneous decision.
  7. The Learned Trial Magistrate erred in law and in fact in failing to give reasons for his decision in dismissing the Appellant's claim and allowing the Respondent's counterclaim as required (Pg. 1-2 of the Record).
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Reece Mwani & Co. Advocates were dated 17<sup>th</sup> January 2024 and received in court on 19<sup>th</sup> January 2024. The Respondent's written submissions drawn by M.Kiveu Advocates were dated 2<sup>nd</sup> April 2024 and received in court on 4<sup>th</sup> April 2024.

### **Background to the appeal**

8. The Appellant filed a suit Butali PMCELR Case No. 1 of 2022 against the Appellant for unlawful and unfair termination through the Memorandum of Claim dated 18<sup>th</sup> August 2018 and filed on 24<sup>th</sup> August 2018, seeking the following reliefs: -
  - a. A declaration that the Claimant's employment was unlawfully and wrongfully terminated by the Respondent in violation of Articles 28,41(1), 47,48 and 50(1) of the Constitution of Kenya, 2010, as well as Section 42 of the Employment Act, No.11 of 2007, Laws of Kenya.
  - b. An award of damages for breach of contract and unlawful and wrongful termination of employment as hereunder.
    - i. Damages for unlawful termination (12 months' salary)- Kshs. 324,287.40/-
    - ii. One Month's salary in lieu of notice - Kshs. 27,023.95/-
    - iii. Service Pay (15 days pay per every year worked) - Kshs. 94,583.86/-
    - iv. Underpayment – Kshs. 1,161,354.60/=.
    - v. Unpaid salary for December and January – Kshs. 54,047.90/-
    - vi. Unpaid Leave (7 years) - Kshs. 189,167,65/=

Total - Kshs. 1,850,461.36/-
  - c. Interest on (b) above at court rates until payment in full.
  - d. Certificate of Service.
  - e. Costs of this suit plus interest at court rates until payment in full.
  - f. Any other relief that the court may deem fit to grant.
9. The Statement of Claim was supported by the Verifying Affidavit of 28<sup>th</sup> February 2022 and accompanied by the Appellant's List of Witnesses dated on even date, the Appellant's witness statement dated 28<sup>th</sup> February 2022, her List of Documents of even date, and her Bundle of Documents (page 3-27 of the record is the Appellant/Claimant's case).



10. The Respondent filed the Response to Claim dated 4<sup>th</sup> April 2022 received in court on 14<sup>th</sup> April 2022, which had a Counterclaim in the following terms: -
  - a. Dismissal of the claim.
  - b. Judgement for Kshs. 1,461,800/- as per the Respondent's Counter-claim.
  - c. Costs and
  - d. Interest
11. The Response to claim was accompanied by the Respondent's List of witnesses dated 4<sup>th</sup> April 2022; the Verifying Affidavit by Ito Mukhwana sworn on even date, the Witness statements of Ismael Nyadundo Alube, Mukhwana Sunguti Ito and Lucy Magani all dated 4<sup>th</sup> April 2022, the Respondent's List of Documents dated 4<sup>th</sup> April 2022 and the Respondent's bundle of documents (Pages. 28-62 of the record is the Respondent's case in the lower court).
12. The Appellant filed a Reply to the Response to Claim and Counterclaim dated 31<sup>st</sup> May 2022(pg.63) and received in court on 13 July 2022, and on 29<sup>th</sup> November 2022, filed a Notice of Change of Advocates from Tunoi and Company Advocates to Ms. Reece Mwani & Company Advocates(pg.64). Additionally on 27<sup>th</sup> February 2023, the Appellant filed a Further List of Documents dated on even date and one document attached (Pg. 65-66 of the Record).
13. The Trial Court proceeded with the hearing of the Appellant/Claimant's case with her as the only witness on the 28<sup>th</sup> of February 2023. The defence case was heard on the 28<sup>th</sup> of July 2023 with Lucy Magam (DW1), Ishmael Adope (DW2); Wasike CPA(DW3), and Mukhwana(DW4) as the defence's witnesses(pg. 91-101 of the Record).
14. The parties filed submissions in the lower Court after the closure of the defence. The Appellant/Claimant's submissions were dated 17<sup>th</sup> August 2023 and filed on 23<sup>rd</sup> August 2023 (pg. 67-70 in the record of Appeal). The Respondent filed written submissions (pg. 71-88 of the Record).
15. The Trial Court (Hon. R. S. Kipngeno) delivered its judgment on the 3<sup>rd</sup> of October 2023 (pg. 106-110 of the Record ) and entered judgement partially in favour of the Appellant for Service pay(Kshs. 94,583.86/-) and unpaid salaries of December and January(54,047. 60) and allowed the Respondent's Counterclaim of Kshs. 1,461,800/-.

## **Determination**

### **Issues for determination**

16. The Appellant in her submissions identified the following issues for determination in the appeal.
  - a. Whether the Appellant was unfairly terminated
  - b. Whether the Appellant is entitled to the reliefs sought
  - c. Whether the Respondent's Counterclaim for Kshs. 1,461,800/-
17. The Respondent in its submissions identified the following issues for determination in the appeal: -
  - a. Whether the appeal is merited
  - b. Whether or not the appellant has satisfied the grounds for setting aside the entire judgement delivered in the trial court.



- c. Who bears the costs
18. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
19. The court guided by Selle's decision, that the court sitting at first appeal has to evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach own conclusion, finds the issues for determination in the appeal are as follows: -
1. Whether the Appellant was unfairly terminated
  2. Whether the Appellant is entitled to the reliefs sought
  3. Whether the Respondent's Counterclaim for Kshs. 1,461,800/- was merited
  4. Whether the appeal was merited.

### **1) Whether the Appellant was unfairly terminated**

20. Under this issue the appellant raised the following grounds of appeal:-
- a. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant absconded duty despite the Respondent's admission that the Appellant was suspended from duty.
  - b. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant possessed no specialized training as against the evidence on record.
  - c. The Learned Trial Magistrate erred in law and in fact in holding that the Appellant's dismissal was fair and lawful.
21. In the claim, the Appellant had pleaded unfair termination in paragraphs 5 and 6 as follows:-
- ' (5) That on the 28<sup>th</sup> December 2021 the respondent gave the claimant compulsory leave and she was required to report back on duty on the 24<sup>th</sup> January 2022. Upon reporting back on 24<sup>th</sup> January 2022 she was informed by the FSA chairperson, Ismael Alube, that her services had been terminated with immediate effect.
  - (6) that the respondent terminated the claimant's employment on 24<sup>th</sup> January 2022 without according the claimant a fair hearing as required by law."
22. In response to the claim the employer(page 26) stated: -
- ' 4 In response to Para.5 of the claim , the respondent avers that it has not terminated the service of the applicant who is still on compulsory leave and the averments to the contrary are unsubstantiated.
  5. The Respondent has always given an opportunity to the claimant to answer charges of fraud against her but the claimant has snubbed all the summons electing instead to rush and file this present claim."
23. During the hearing, the Appellant told the trial court she was first suspended then her services terminated. She referred to a dismissal letter dated 1<sup>st</sup> April 2022 (the record does not indicate the letter was produced (page 92).



24. During cross-examination, the appellant was shown the letter dated 7<sup>th</sup> June 2021 inviting her for a disciplinary hearing, the report to the police of the allegation of fraud, forensic report. The appellant denied having received letter dated 1<sup>st</sup> February 2022 inviting her to a hearing (page 4).
25. During re-exam, the appellant told the court that the letter of invitation did not have her address and was fictitious (page 5).
26. DW 1 was the internal auditor who noted a loan taken was not being serviced.
27. DW2 was the chairman of the respondent who upon being informed of the ghost loans investigated and reported to the police, he stated they had issued a warning to the appellant and called her for disciplinary but she never responded to their letters.
28. DW2 on cross-examination stated they reported cases to the police but he was not aware of a case against the appellant with the police. He had not filed the disciplinary committee minutes in court. That the Appellant was sacked on the 1<sup>st</sup> April 2022.
29. DW3 was an accountant requested by the Respondent to examine the financial records and prepare the forensic audit report (D-exh 1). He informed the trial court that they found employees had conspired to defraud the respondent and identified the main culprit as the Appellant who was the cashier.
30. During cross-examination, DW3 told the court they did not get a chance to interview the appellant. He told the court that the cashier had already absconded duty and sued the management. He noted that the disbursement of monies done by the cashier could not be done without the approval of the manager. The original forms were destroyed as soon as the loans were disbursed hence had no basis to find the manager culpable. He stated that the respondent lost money.
31. DW4 was the manager of the respondent. He stated that he paid the Appellant salaries from December 2021 to March 2022 and since she had stopped working they stopped the salary payment.
32. During cross-examination, DW4 told the court that he approved the disbursed loans. That upon approval the customer care clerk prepares the payment voucher and the loan applicant takes the approved documents to the cashier. That he paid the appellant's salary for December, January, February and March and had the payslip and said salary was paid to the bank account with all other staff (D-exh 5(a)(b)(c) were December, January, and February payslips. ) DW4 said the salary had been deposited into the staff accounts with FSA but had not produced any document showing deposit of salary. He was the only one in the alleged fraudulent transactions still in the employment of the Respondent. He had not produced minutes of the disciplinary hearing. He told the court they had called the Appellant for a disciplinary hearing but she did not come. (page 89-109 was the proceeding of the lower court).
33. The Learned Magistrate on the issue held that the claimant absconded duty and was summarily dismissed on 1<sup>st</sup> April 2022 for absconding duty. That she was required to resume duty on 24<sup>th</sup> January 2022 and failed to do so. The learned magistrate found the appellant had absconded duty for three months without permission hence gross misconduct for summary dismissal.
34. The Respondent produced a letter dated 1<sup>st</sup> April 2022 detailing her snubbing of meetings called on 4<sup>th</sup> February 2022 and 11<sup>th</sup> February 2022. She was dismissed for fraud of Kshs. 1,461,800./- The appellant told the trial court she received the dismissal letter while the case was ongoing.
35. During cross-examination, the appellant denied having received a letter of invitation to attend the disciplinary hearing.



36. The court noted a demand letter was issued dated 11<sup>th</sup> February 2022 stating the Appellant's services had been terminated on 24<sup>th</sup> February 2022. The respondent did not reply to this letter. The dismissal letter was thus done while this case was pending.
37. The court finds that the employer produced evidence to support the reasons for termination of the services of the appellant with it and upholds the trial court finding on lawful termination.
38. On the procedural fairness, under section 41 (2) of the *Employment Act* an employer is required to hear an employee like the appellant facing charges of gross misconduct 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."

The decision relied on by the appellant of *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) e KLR was consistent with the provisions of section 41(2) of the *Employment Act*.

39. The court found no evidence of service of the disciplinary letter (D-exh 2). The court then finds for lack of evidence of efforts towards disciplinary hearing before the termination of the Appellant who was alleged to have absconded duty, the court holds that there was no procedural fairness.

#### **Whether the Appellant is entitled to the reliefs sought**

40. The Appellant in their claim sought the following reliefs:-

- i. Damages for unlawful termination (12 months' salary)- Kshs. 324,287.40/-
- ii. One Month's salary in lieu of notice - Kshs. 27,023.95/-
- iii. Service Pay (15 days pay per every year worked) - Kshs. 94,583.86/-
- iv. Underpayment – Kshs. 1,161,354.60/=.
- v. Unpaid salary for December and January – Kshs. 54,047.90/-
- vi. Unpaid Leave (7 years) - Kshs. 189,167,65/=

Total - Kshs. 1,850,461.36/- together with cost and interest and certificate of service.

41. I held there was no procedural fairness. I also held the termination of the employment of the Appellant was based on lawful and valid reasons. On the other reliefs sought, the trial court in judgment made the following findings on the other reliefs. That the appellant had no professional qualifications beyond KCSE. That she was employed as a customer service clerk and the location of the business determined the wages paid. The trial court did not believe that she had not taken leave for a period of 7 years. The court awarded service pay limited to three years based on limitation of contracts of service under section 35(5) of the *Employment Act*.
42. The trial court found evidence that the appellant disbursed the loans from the system and that some customers' particulars were cooked and awarded the counterclaim as sought.
43. The Appellant being aggrieved with the awards and raised the following grounds of appeal:-



- a. The Learned Trial Magistrate erred in law and in facts in allowing the counter-claim without considering the evidence on record.
  - b. The Learned Trial Magistrate erred in law and in failing to appreciate the applicable law.
  - c. The Learned Trial Magistrate erred in law and in fact failing to appreciate the facts and circumstances of the matter before the court and the submissions made on behalf of the Appellant hence arriving at an erroneous decision.
  - d. The Learned Trial Magistrate erred in law and in fact in failing to give reasons for his decision in dismissing the Appellant's claim and allowing the Respondent's counterclaim as required (Pg. 1-2 of the Record).
44. The court proceeds to evaluate the evidence on the reliefs save for the unfair and unlawful claim which the court found there was only lack of procedural fairness.
  45. The appellant did not challenge the awarded service pay and there was no cross-appeal. Service pay awarded is thus not subject of appeal. That also applies to the awarded unpaid salary for two months.
  46. The outstanding reliefs for the court to re-evaluate evidence on are as follows:-Underpayment – Kshs. 1,161,354.60/= .Unpaid Leave (7 years) - Kshs. 189,167,65/=

**Claim for Underpayment – Kshs. 1,161,354.60/=.**

47. The appellant pleaded on 29<sup>th</sup> March 2019 she was promoted to cashier earning Kshs. 13360 per month instead of the minimum salary of Kshs. 27,023.95 and was thus underpaid for three years.
48. The court found that the wage order was not produced at the trial court. The learned magistrate observed that the location of the business affected the payable wages and that the appellant was not qualified beyond KCSE. The appellant in their written submission did not address this issue save to say there was no evidence that they lacked the qualifications.
49. The response, on the other hand, submits that they had a contract with the claimant whose terms she accepted and the court cannot rewrite the contract between parties and relied on decisions in *William Muthee Muthami v Bank of Baroda* (2014)e KLR and *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and another* (2001)e KLR. In the National Bank case the court held:- ‘ A court cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded or proved.’ The respondent submits that the case for underpayment was raised due to the counterclaim but the court finds underpayment was pleaded in the claim at paragraph 4.
50. Section 26(2) of the *Employment Act* recognizes the minimum wages order. The contract of employment unlike other contracts is subject to minimum terms of employment under the law, available regulations and or collective bargaining agreement. Kenya has ratified International Labour Organisation Convention 131 Minimum Wage Fixing Convention, 1970 (No. 131) which under Article 2 provides to wit: -
  - “1. Minimum wages shall have the force of law and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions.”

The Court can thus overrule unfair employment contracts under section 26(2) of the *Employment Act* and the *ILO Convention 131*.



51. The Appellant stated she was underpaid at two levels. In paragraph 3 of the statement of claim that she was employed on 6<sup>th</sup> September 2014 as a customer care officer/ receptionist at a salary of Ksh. 7,000 per month instead of a minimum wage of Kshs. 16,295.95 and was thus underpaid for 6 years. That on 29<sup>th</sup> March 2019, she was promoted/deployed as a cashier earning salary of Kshs. 13,360 instead of the minimum salary of Kshs, 27,023.95 and thus underpaid for 3 years.
52. The employer is obliged to pay workers in compliance with the minimum wages prescribed under the wages order issued by the ministry in charge of labour from time to time pursuant to provisions of section 26 of the Employment Act to wit:-

" 26 Basic minimum conditions of employment

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply. "

Article 2(1) International Labour Organisation Convention 131 Minimum Wage Fixing Convention, 1970 also applies to wit:-

" 1 Minimum wages shall have the force of law and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions."

53. The trial magistrate found the appellant was unskilled having only KCSE qualifications. I perused the record and found the Claimant did not produce evidence of her qualifications. On the 1<sup>st</sup> limb of her claim, the appellant relied on a letter of employment dated 8<sup>th</sup> September 2014 which indicated she was appointed as customer care officer. It was thus misleading for her to plead the position of receptionist. The court finds that the position of customer care officer is not under the wages order. The court was thus right to deny her the claim for underpayment under the 1<sup>st</sup> limb.
54. On the second limb, vide a letter dated 29<sup>th</sup> March 2019, the appellant was deployed as cashier effective 1<sup>st</sup> April 2019. She pleaded that she was paid monthly salary of Kshs. 13,360 for the entire period and stated it was underpayment. The relevant wages order was that of 2018. Under the wages order the position of cashier for Malava area which falls under 'all other areas' attracted minimum wages per month of Kshs. 27,023.95. The Respondent stated that she signed the contract and agreed to terms relying on the National Bank case to effect that the court cannot rewrite a contract between parties. I do find that employment contracts are unique as the minimum employment terms are regulated under section 26 of the Employment Act, ILO Convention 131( Minimum Wage Fixing Convention, 1970) and are subject to regulations on minimum wages. The position of cashier held by the appellant was subject to the minimum wage order of 2018. The respondent even brought a counterclaim against the appellant based on her position as cashier. The learned magistrate erred in stating she had no qualification yet it was not disputed she worked as a cashier a position whose wages are protected under the minimum wages order.



55. I do find merit in the appeal on the underpayment under the position of cashier and award underpayment from 1<sup>st</sup> April 2019 to 24<sup>th</sup> January 2022 when the Appellant's services were deemed terminated being the difference between the minimum wages of Kshs. 27,023.95 and earned monthly salary of Kshs. 13360 thus Kshs 13,667.95 monthly underpayment.
56. Underpayment is equivalent of backpay and falls under category of continuing injury whose time limitation is 12 months after termination of contract pursuant to section 90 of the *employment act*. The court of appeal in The *German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) Neutral citation: [2023] KECA 894 (KLR) observed :- "Back pay can be defined as the difference between the amounts of pay a worker is owed versus what they actually received. Essentially, back pay is the term for wages that are owed to an employee for work done in the past, yet, for whatever reason, the employer withheld these wages from the employee's paycheck. Payment of back pay depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically. The workman is required to plead and prima facie prove the claim." The claimant stated her services were terminated on the 24<sup>th</sup> January 2022 and she filed her claim on 3<sup>rd</sup> March 2022 which the court finds was within the 12 months. The court found underpayment based on Minimum Wages Order of 2018 for the cashier position. The court finds the period of underpayment is 9 months in 2019, 12 months in 2020, 12 months in 2021 and 24 days in 2022(33 months and 24/31 January 2022) total underpayment 451,042.35 plus 10582/- total underpayment Kshs. 461,624/-

**Claim for Unpaid Leave (7 years) - Kshs. 189,167,65/=**

57. On the claim for untaken leave, the Court finds that the claimant was on compulsory leave from 28<sup>th</sup> December 2021 and she led evidence her services were terminated on 24<sup>th</sup> January 2022. I find the leave claim had no basis as annual leave ought to be taken every year and there was no evidence the claimant applied for leave and it was denied the years before 2021. The decision on untaken leave by the trial court is upheld.
58. In the upshot, the Court holds that the Appeal is successful on the underpayment claim which is awarded for sum of Kshs. 461,624/- There was no cross-appeal on the two-month salary awarded, service pay and notice pay and the same holds.

**Whether the Respondent's Counterclaim for Kshs. 1,461,800/- was merited**

59. On the counterclaim, the trial court in finding the Appellant culpable relied on the forensic evidence before the court. The Court on appeal is required to evaluate evidence and reach own conclusion(See *Selle* case). The forensic report stated : ' The forensic audit has established that a number of officers in the Malava FSA colluded to cause FSA to lose Kshs. 1,461,800 through disbursement of fictitious loans...'”(page 41 of the record) The report found the loans were fictitious and that there were no loan forms.
60. It was indicated in the said report that the author of the forensic report did not get a chance to interview the actual culprits to get their side of story. The cashier clerk(the Appellant) who was disbursing cash at the time had already absconded duty and sued the management for alleged verbal dismissal. The customer care clerk had also absconded duty (page 43 ).
61. The forensic report's author noted a major weakness in that the loan forms were handled entirely by staff, loans clerk, customer care clerk, accountant assistant and cashier clerk. The report states: ' we traced fraud transactions in the system from start to finish.'”(page 44)



62. Considering the foregoing findings in the forensic report, I find there was no proof of how much the appellant was liable for defrauding the respondent and consequently the counterclaim was not proved on a balance of probability.
63. In the upshot, the appeal is allowed partly. The Court sets aside the judgment of Judgment of Hon. R. S. Kipngeno (SPM), Butali, delivered on 3<sup>rd</sup> October 2023 in Butali PMCELR case No. 1 of 2022 and substitutes the same with the entry of judgment in the claim dated 28<sup>th</sup> February 2022 in the following terms:-
- i. One month notice pay of Kshs. 27,023.95
  - ii. Service pay award of 94,583.86.
  - iii. Unpaid salary of December and January of Kshs. 54,047.90.
  - iv. Underpayment award of Kshs. Kshs. 461,624/-
  - v. The counterclaim award is set aside for lack of proof on balance of probabilities on the actual loss attributable to the Appellant.
  - vi. Certificate of service to issue in terms of section 51 of the [Employment Act](#).
64. On costs and interest. The Court considered the circumstances of the termination of employment relations which attributed reasons for termination on the Appellant. The court declines to award of interest and costs in the claim and appeal considering the Appellant by breach of contract caused the respondent to incur losses and there were valid reasons to dismiss her from employment.
65. The court orders each party to bear own costs of the claim and in this appeal.
66. It is so ordered.

**DATED, SIGNED, AND DELIVERED ON THE 16<sup>TH</sup> DAY OF APRIL 2024 IN OPEN COURT AT KAKAMEGA**

**J.W. KELI**

**JUDGE**

In the presence of

C/A Lucy Macheso

For Appellant: Ms. Masika h/b Mwani

For Respondent: Mondia

