



African Salihia Cargo & Clearing Company Limited v Omwanda (Appeal E128 of 2022) [2024] KEELRC 13236 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E128 OF 2022
NJ ABUODHA, J
NOVEMBER 21, 2024**

BETWEEN

**AFRICAN SALIHIA CARGO & CLEARING COMPANY
LIMITED APPELLANT**

AND

GODWIN O OMWANDA RESPONDENT

(Being an appeal arising from the Judgment of Honourable Mrs. L.B KOECH (PM) in Milimani CMELRC No. 977 of 2019 Godwin O. Omwanda vs Africansalibia Cargo & Clearing Company Limited delivered on 9th June, 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 27th July, 2022, the Appellant appeals against part of the Judgment of Honourable Mrs. L.B Koech delivered on 9th June, 2022.
2. The Appeal was based on the grounds that:
 - i. The Learned trial Magistrate erred in fact and in law by arriving at contradictory findings, holding on the one hand that the Respondent's employment with the Appellant commenced in August 2015, yet on the other hand awarding the Respondent salary underpayments for the year 2013, 2014 and 2015.
 - ii. The Learned trial Magistrate erred in fact and in law in awarding the Respondent herein salary underpayments in the sum of Kshs 419,086.00/= by disregarding the evidence of the Appellant's evidence on record any due consideration or any at all leading to an erroneous decision.
 - iii. The Learned trial Magistrate misdirected herself on the evidence tendered before the trial court in awarding the Respondent herein salary underpayment for the period 2013-2018 when the



said Respondent had not sufficiently demonstrated that salary was indeed underpaid during the said period.

- iv. The Learned trial Magistrate erred in law and in fact in failing to interpret and properly apply the provisions of the Regulation of Wages (General) Order and the Regulation of Wages (General) (Amendment) Order 2017 with respect to the Respondent's category of employment thus arriving at a wrong decision.
 - v. The learned trial Magistrate misdirected herself on the evidence tendered before the trial court in awarding the Respondent Kshs 51,095.00/= as salary for days worked in December, 2017, January 2018 and 19 days in March 2018 by failing to give due consideration to the Appellant's evidence on record to the effect that the Respondent did not report to work during the said period thereby arriving at an erroneous decision
 - vi. The Learned trial Magistrate erred in law and in fact in finding the Respondent herein was entitled to any of the reliefs he had sought and specifically the claim for salary underpayment for the period 2013-2018 and the claim for salary for days worked in December 2017, January 2018 and 19 days in March 2018.
 - vii. The Learned trial Magistrate erred in law and in fact in failing to find the Respondent had proven his claim for salary underpayments for the period 2013-2018 and claim for unpaid salary on a balance of probabilities.
 - viii. The Learned trial Magistrate erred in law and in fact in failing to properly analyse the evidence on record in respect to the Respondent's employment with the Appellant and particularly failed to give any consideration at all to the Appellant's evidence on record, thus leading to an erroneous finding and decision.
 - ix. The Learned trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions and legal authorities relied in support thereof.
3. The Appellant prayed that the appeal be allowed and part of the judgment delivered on 9th June, 2022 by the trial Court making awards of unpaid salary for days worked in December 2017, January 2018 and 19 days in March 2018 in the sum of Kshs. 51,095.00/=, underpayments for the period 2013-2018 in the sum of Kshs 419,086/= and the award of costs and interest to the Respondent be set aside and be substituted with a dismissal with costs.
 4. The Respondent on the other hand being dissatisfied with the above judgment filed a Memorandum of Cross Appeal dated 1st January, 2023 on the grounds that:
 - i. The trial Magistrate erred in fact and in law by finding that the Respondent did not show or prove that he was drugged, despite overwhelming evidence to the contrary.
 - ii. The trial Magistrate erred in fact and in law by finding that the Respondent was given a show cause letter which he refused to sign without proof that the letter was served and or how the said letter was served.
 - iii. The trial Magistrate erred in fact and in law by finding that the Respondent was terminated fairly, contrary to the evidence presented in court and without giving the reasons(s) for this finding.
 5. The Respondent prayed that the cross appeal be allowed and the Judgment and decree herein be varied or set aside with the Respondent's claim which was dismissed being allowed with costs.



6. The Appeal and the Cross Appeal were disposed of by written submissions.

Appellant's Submissions

7. The Appellant's Advocates Busaidy Mwaura Ouma & Company Advocates filed written submissions dated 3rd June, 2024. On the issue of whether the trial court contradicted itself while holding that the Respondent's employment with the Appellant commenced in August 2015 on one hand and awarding the Respondent salary underpayments for the years 2013, 2014 and 2015 counsel submitted that the trial court misdirected itself while agreeing that the Respondent commenced work in August 2015 but still awarded underpayments in 2013-2015 when he was not their employee. That the Appellant started remitting NHIF and NSSF payments in 2015 when the Respondent was employed on permanent basis.
8. On the issue of whether the trial court erred in awarding the Kshs 419,086/= as underpayment for 2013-2018 counsel submitted that the trial court failed to consider the Regulation of Wages (General) Order and Regulation of Wages(General) (Amendment) Order 2017 by failing to elucidate the rate utilized in determining this amount.
9. Counsel submitted that as per Regulation of Wages(General)(Amendment) Order 2013 the basic minimum monthly wage for a general labourer was set at Kshs 9,780.95 while in 2015 at Kshs 10,954.70/=. That the Respondent's consolidated salary of Kshs 11,646.76/= was higher than what the law required hence the Respondent was never underpaid and never entitled to any underpayment.
10. On the issue of whether the trial court erred in awarding the Respondent accrued salary of Kshs 51,095/- for 9 days in November, December 2017, January 2018 and 18 days in March 2018 counsel submitted that the Respondent was not at work to be paid or any paid leave. That the Respondent absconded duties from 8th November,2017 to 20th March,2018.
11. In opposition to the cross-appeal counsel on the issue of whether the trial court erred by finding that the Respondent did not prove that he was drugged submitted that the trial court was sound in finding that the Respondent had not sufficiently proved that he was drugged as alleged. That the Respondent did not produce as evidence an OB number or P3 form that he had reported the incident to the relevant authorities and he did not call any other witnesses like a medical doctor to corroborate his claim.
12. Counsel relied on sections 106,107,108 and 109 of the Evidence Act as well as Case of Eunice Wayua Munyao v Mutilu Beatrice & 3 Others (2017) eKLR among others on burden of proof on a party who alleges facts requiring the court to believe that they exist.
13. On the issue of whether the Respondent was given a show cause letter which he failed to sign/ acknowledge and the finding that the Respondent was fairly terminated counsel, relied on section 45(2) of the Employment Act on what amounts to unfair termination. Counsel further submitted that the Respondent was terminated on grounds of gross misconduct as per Section 44(4) (a) and (c) of the Act. The respondent absconded duties hence the employer was justified in summarily dismissing him.
14. Counsel submitted that the Appellant had valid and justifiable reasons to terminate the Respondent. He relied on the case of Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR on employer illustrating efforts made to reach the absconding employee. The Appellant made efforts to reach the Respondent who did not pick their calls because he had misappropriated the amount of USD 264 hence was acting evasively.
15. Counsel also relied on section 41 of the Act on procedural fairness and submitted that the Appellant notified the Respondent through a show cause letter dated 20th November,2017 which it attempted



to serve upon the Respondent on 12th March,2018 but he refused to acknowledge receipt. The respondent left the place of work and returned a week later on 19th March,2018 and the Appellant was terminated via a letter dated the same day.

16. Counsel submitted on the respective burden of the parties as per section 47(5) of the Act and relied on the case of Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR on when a misconduct goes to the core of the employment relationship.
17. Counsel submitted that despite the Respondent taking money fraudulently belonging to the Appellant the Appellant was not able to take immediate disciplinary action due to the Respondent's absence from work. That the trial magistrate was right in not awarding the other claims prayed by the Respondent in his claim because they were not proved.
18. In conclusion counsel submitted that this court should disturb the trial court findings and allow the appeal and relied on the case of Mbogo & Another Vs Shah,(1996) EA among others on when the court may interfere with the discretion of the trial court.

Respondent's Submissions

19. The Respondent through its advocates Rakoro & Co filed his submissions dated 1st October,2024 and on the issue of whether the Appeal was properly before the court counsel submitted that the same was filed out of time as Judgment was delivered on 9th June,2022 but the Appeal filed on 27th July,2022 which was more than 30 days given under section 79G of the Civil Procedure Act. That the Appeal from lower court to this court is via Memorandum of Appeal not via a notice of appeal as the Appellant did.
20. On the issue of when the Respondent was employed counsel submitted that the same could be discerned from the Respondent's witness statement at the lower court where it can be seen the Respondent was employed on 13th November,2013 as a store attendant. That the trial court contradicted itself when it said he was employed in August 2015 which was not true as per his claim yet awarded underpayments for 2013-2015. Counsel submitted that there was no proof that he was employed as a casual labourer in 2013-2015 and not a permanent employee. That the Appellant's employees Service Manual Handbook did not provide for casual employment.
21. Counsel further submitted that on the leave application form dated 24th September,2017 the Respondent was described as a store attendant. That sections 7,8,9 and 10 of the Employment Act and the case of Yaa v SGA Security Solutions Limited(ELRC Appeal E002 of 2022) (2022) KEELRC 1553 (KLR(29July 2022) (Judgment) requires an employer to reduce employment contract to writing which did not happen in this case because the contract was oral. Counsel further relied on section 37 of the Act on the issue of conversion of casual employees to term contract after three months and submitted that the Respondent was converted to a permanent employee under the said section.
22. Counsel submitted that the burden of proving that the Respondent was a casual general worker or labourer from 2013 and was only employed on contract in 2015 rested with the Appellant which burden was not discharged. Counsel relied on the case of Wafula v Guditi Singh Shop (cause 47 of 2018) (2022) KEELRC 15 (KLR) (9 May 2022) (Judgment) on importance of employer keeping employment records to prove employment issues. The Respondent was employed as permanent employee on November 2013 as a store attendant and not as a casual labourer and worked as such up to 2018 when he was terminated.
23. On the issue of the respondent's drugging, Counsel submitted that in the show cause letter dated 20th November,2017 the appellant admitted the Respondent was drugged but he could not be believed because he did not report the incidence to the police. PW2 Respondent's mother Mary Atieno



- Omwanda testified that on 14th November, 2017 the Respondent was brought to her house while sick and she reported the same to the Appellant on the same day that the Respondent would be away on sick off which was accepted.
24. On the issue of whether the Respondent was given a show cause letter which he refused to accept counsel submitted that the Appellant alleged that from 8th November,2017 the respondent went back on 12th March,2018 and 19th March,2018. The Respondent on the other hand alleged that he was not there on 12th March but on 19th March,2018 when he signed the dismissal letter as per requirements of clause 1.8.1 of the Appellant's Employee Service Handbook Rules and regulations. That it was interesting how he would sign the dismissal letter and refuse to sign the show cause letter.
 25. Counsel further submitted that the Appellant's employee handbook under regulation 2.1.2 provided for signing of reporting book by employees which was never produced by the Appellant to illustrate that the Respondent reported that day. There was no evidence of the service of the show cause letter as what was served was the dismissal letter on 19th March, 2018.
 26. Counsel submitted that Regulation 1.8.1 and 1.8.4 of the Employee handbook provided for serving of disciplinary matters of an absconding employee to his last known address while copying the General Manager/Station manager. That there was no proof of posting of the show cause letter of 20th November,2017.
 27. On the issue of whether the Respondent was terminated fairly using a fair procedure counsel submitted that the termination was unfair and contrary to section 41, 43 and 45 of the *Employment Act*. The charges in the letter to show cause differed with those in termination letter. Counsel relied on the case of Charles Wanjala Watima v Nyali Golf & Country Club Ltd (2013) eKLR on the burden of proof of parties as per section 47(5) of the Act. In the show cause letter the Appellant alleged that the Respondent received money but kept some without informing the office while the 5 grounds in the dismissal letter were not in the show cause letter.
 28. Counsel submitted that the reasons for the termination were not valid or proved. That the reason of absconding duty from 8th November, 2017 to 19th March,2018 was not proved. That the employer upon realizing the employee was not reporting to work should warn the employee to resume and communicate their intention to take disciplinary action on that account. That an employer must prove efforts made to reach the employee. Counsel relied on the case of Ronald Nyambu Daudi v Tornado Carriers Limited (2019) eKLR
 29. Counsel further submitted that the Appellant did not produce attendance registers to show that the Respondent absconded duties. As per show cause letter the Respondent was terminated while still on suspension. That the law does not contemplate closure of employment contracts through unilateral abandonment of parties obligations under the contract of service. That desertion should not operate to bring contract to closure until the employer acts on it. Counsel relied on the case of Milano Electronics Limited V Dickson Nyasi Muhaso(2021) eKLR.
 30. On the procedural fairness counsel submitted that the Appellant did not adhere to procedural fairness and relied on the case of National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR among others on compliance of section 41, 43 and 45 of the Act.
 31. On the ground of stealing counsel submitted that in the show cause letter the Respondent was suspended indefinitely to pave way for investigations but he was not involved in any investigations nor any investigation report filed in court to prove that the Respondent was never drugged or had the money stolen from him. That a week later on 19th March he was terminated.



32. On the procedural fairness counsel submitted that there was no proof that the Respondent was given a notice to show cause and that he was taken through any disciplinary hearing. That the Appellant alleged the Respondent stole money and also absconded duty but did not demonstrate efforts made to trace the Respondent and establish why he allegedly abandoned work. There was no notice to the Respondent to explain about the money. There was no letter sent to his known address, labour officer, emails or telephone calls about the absconding.
33. Counsel submitted that the Appellant did not demonstrate that it commenced any disciplinary action against the Respondent under section 41 of the Act. There was no disciplinary hearing on those charges.
34. On the issue of whether the Respondent should have been awarded the reliefs sought in his claim counsel submitted that the court only dealt with claim No. 2, 3 and 7 for unpaid salaries and underpayments and there was no mention of other claims like the leave due, overtime, off time of off days due.
35. Counsel submitted that the Respondent was entitled to one-month notice pay as per section 35(5) of the Act and clause 5.4.1 of the Employee handbook. That as per the Regulation of Wages (General) (Amendment) Order 2017 the Respondent who was engaged as a store keeper/ Attendant was entitled to monthly salary of Kshs 22,895.56/= That he was entitled to 9 days worked in November 2017 since there was no proof of payment at Kshs 7,925.45/= not the Kshs 5,820/= awarded by court without explaining how the same was arrived at.
36. Counsel submitted that the Respondent was entitled to accrued salary of December 2017, January-February, 2018 and 19 days worked in March, 2018 at Kshs 79,254.90/= not what was awarded by trial court as Kshs 51,095/= without the rationale used. That the Respondent was ready to work for the Respondent but was on sick leave and the Employee Handbook clause 3.15 captured what was to be paid while on sick leave.
37. Counsel submitted that the Respondent was entitled to unpaid annual leave at Kshs. 85,419.17 as per Clause 3.1.1 of Employee Handbook at 26 working days where the Respondent worked for four complete years from 2014-2017. Counsel submitted that the Respondent was also entitled to off time/ off duty Kshs. 269,058.40/= as per section 27(2) of the Act and overtime of Kshs 1,007,229.60/=
38. Counsel further submitted that the Respondent was entitled to underpayments of Kshs 446,367.56/= as per respective Regulation of Wages (General) (Amendment) Orders for 2013-2017. That he was entitled to compensation at Kshs 274,746.72/= as per section 49(1) (c) of the Act.

Determination

39. The court has considered the pleadings and submissions filed by both parties herein and proceeds to analyse them as follows.
40. The principles which guide this court in an appeal from a trial court are now well settled. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”



41. The Judgment of the trial court was that the Claimant was terminated fairly and was awarded Kshs 5,820/= for 9 days worked in November,2017, accrued salary for December,2017, January-February 2018 and 19 days in March 2018 at Kshs 51,095/= and underpayments from 2013 to 2018 at Kshs 419,086/= together with costs and interests.
42. On the preliminary issue of whether the appeal was properly before the court, it is noted that the Appellant ought to have filed their appeal by 9th July, 2022 since the Judgment was delivered on 9th June,2022. The requirement of section 79G of the *Civil Procedure Act* was within 30 days. The Appellant filed the appeal out of time and did not seek any leave. This court in serving justice since the cross appeal was filed out of time and this issue was not raised at the earliest opportunity will admit the appeal as properly filed.
43. The court finds that the issues placed by the parties for determination in the appeal are with regard to both substantive and procedural fairness before the termination of employment and the award by the trial court. The Court therefore frames issues as follows: -
- a. Whether the trial learned Magistrate erred in finding that the Respondent was fairly terminated.
 - b. Whether the trial learned Magistrate erred in awarding some and not all the reliefs sought by the Respondent
- Whether the trial learned Magistrate erred in finding that the Respondent was fairly terminated.
44. The Appellant faults the trial court for awarding the accrued salary and underpayments for 2013 -2015 stating that the Respondent was not their employee and that he was not entitled to any underpayments in the first place. The Respondent on the other hand alleged that the trial court erred by finding that he was terminated fairly and contended that he was entitled to all reliefs claimed in his claim.
45. The trial court on the other hand found that the Respondent was terminated fairly when he refused to sign/acknowledge the show cause letter on 12th March,2018. This court notes that the burden of justifying the grounds for termination lies with the employer under section 47(5) of the Act. The employer must prove that the reasons for termination is valid under section 43 failure to which the termination will be deemed unfair under section 45 of the Act.
46. The court notes that the reasons given for the termination were absconding of duties from 8th November, 2017 to 19th March,2018, stealing USD 264 given to clear client's goods and the refusal to sign the show cause letter dated 20th November,2017 on 12th March,2018.
47. On the issue of absconding of duties the Appellant must show that efforts were made to reach the Respondent and communicate the intention to initiate disciplinary action on account of absconding duties. In the case of *Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR* this court held that;
- An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
48. The Appellant did not produce any evidence before the trial court to show if it called the Respondent back to work from 8th November,2017 to March 2018 when it tried serving the Respondent with the show cause letter. There was no evidence of email to the Respondent during the period they tried to serve him with the show cause letter as per Employee Handbook Regulation 1.81.1 and 1.8.4 which



required service of disciplinary matters to be posted to the employees last known address with a copy to General manager.

49. The court reads some mischief on why a letter dated 20th November, 2017 would be served on 12th March, 2018 almost four months after. The Respondent alleged that he signed the dismissal letter of 19th March, 2018 and there was no way he would refuse signing the Show cause letter. The Respondent also alleged that he never visited the Appellant's place of work on 12th March, 2018 as the Employee Handbook regulation 2.1.2 requires employees to sign reporting book. This book was never produced to show that he reported or not on that day.
50. On the issue of stealing of USD 264 the Appellant did not avail the investigation report as per the show cause letter to show that indeed the Respondent stole the money and that he was never drugged.
51. The court noted that in the notice to show cause the Appellant acknowledged the issue of drugging of the Respondent and only blamed him for not reporting the incident to the police. The Respondent's witness Mary, his mother, also testified that when the Respondent was brought to her house on 14th November, 2017 sick, she communicated the same to the Appellant. This meant that the Appellant knew what befell the Respondent.
52. The court is therefore persuaded that the Appellant did not have valid and justifiable reasons to terminate the respondent's service and disagrees with the trial court's finding in that regard. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the court held as follows: -

Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

53. This court is of the view that the reasons for termination were not fair within the meaning of sections 43 and 45 of the *Employment Act*.
54. On the procedural fairness the trial court found that the Respondent refused to sign or acknowledge the show cause letter hence termination was fair. The Court disagrees with this assertion for the reasons showed above that there was no evidence of service of the show cause letter and there was no disciplinary hearing undertaken in the case. The court is of the view that due procedure was not followed as provided for under section 41 of the *Employment Act*. The courts have always held that even in cases of gross misconduct warranting dismissal an employee must be heard. This was the position in the case of *Prof. Macha Isunde vs Lavington Security Guards Limited* [2017] eKLR, where the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

55. In conclusion the court finds that the Appellant had no valid reason to dismiss the Respondent and equally failed on the procedure under section 41 of the Act hence this amounted to unfair termination under section 45 of the Act.

Whether the trial learned Magistrate erred in awarding or not the reliefs sought by the Respondent



56. The court will first deal with the issue of when the Respondent was employed. It was not disputed that the Respondent started working with the Appellant in November, 2013. The Appellant alleged that the Respondent was a casual employee and it was only in August 2015 when he was employed on permanent basis.
57. The court notes that under section 37 of the act a casual employee converts to a term employee after three months. The court has amplified this position as was held in the case of *Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited* [2013] eKLR that:
- “The *Employment Act*, 2007 has now created a fundamental shift from the previous *Employment Act*, Cap 226 with regard to who a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and converts such casual employment into term contract status.”
58. This therefore means the Respondent converted to a term employee by February 2018 if at all he was a casual employee as alleged. The Respondent denied being employed as a general worker since the leave application forms he was described as a Store Keeper/Attendant. There was no document to show that the Respondent was employed as a general worker. The duty rested with the Appellant as the custodian of employment records as per section 74 of the act to illustrate this assertion.
59. The Respondent was therefore entitled to one-month notice pay at Kshs 22,895.56/= as per section 35(1) (c) of the Act since he was terminated without notice. The Respondent was also entitled to the 9 days worked in November, 2017 since there was no evidence provided by the Appellant that the Respondent was paid for those days worked.
60. On the salary for December, 2017, January-February 2018 and 19 days of March, 2018 the trial court awarded Kshs. 51,095/=. The court takes the position that the Respondent was on sick leave hence Clause 3.15 of the Employees Service Handbook applies where the first 15 days were to be with full pay, the next 30 days half pay and no pay for the rest of the days. The Respondent was away from 8th November, 2017 to March 2018 which was roughly four months and hence the first 15 days he would be paid half of the salary and the next 30 days half of the salary to make it a one -month salary at Kshs 22,895.86/=
61. On unpaid leave, off time/off duty pay and overtime pay the court agrees with the trial court that the same were not adequately proved hence the Respondent was not entitled to the same. The Appellant in addition alleged that the Respondent had utilized all his leave days and he did not prove how many days he did not take.
62. On the underpayments which the court awarded the Respondent Kshs 419,086/= without explaining how the court arrived at the same this court agrees with the trial court that the Respondent was employed as a store keeper/Attendant and not a general labourer as alleged by the Appellant. This court notes as per Regulation of wages (General)(Amendment) *Orders of 2013* to 2017 the Respondent was entitled to between 2013-2015 Kshs 17,324.34/=, 2015-2017 Kshs 19,403.26/=, 2017-2018 Kshs 22,895.56/= hence entitled to Kshs 446,367.56/= as underpayments.
63. On compensation for unfair termination this court deviates from the trial court having established that the Respondent was unfairly terminated and takes in to consideration section 49(4) of the act



that indeed the Respondent worked for around 4 years and awards him three months' salary as compensation for unfair termination.

64. In the upshot the Appeal fails for lack of merit while allowing the cross appeal partially as follows.

- a. One month's notice pay....Kshs 22,895.56/=
- b. 9 days salary for November,2017...Kshs 7,925.45/=
- c. Sick leave payments Kshs 22,895.56/=
- d. Unpaid leave, Off time and overtime. NIL
- e. Underpayments Kshs 446,367.56/=
- f. 3-months compensation for unfair termination....Kshs 68,686.68=
Total.....KSHS 568,770.81/=

65. Considering the circumstances of this appeal and the cross appeal each party shall bear their own cost of this Appeal and the cross appeal.

It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024 DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

