Karania t/a Kipmatt Limited v Masheti (Appeal E022 of 2022)
[2024] KEELRC 13193 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13193 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL E022 OF 2022

DN NDERITU, J

NOVEMBER 21, 2024

BETWEEN

RASHIQ KARANIA T/A KIPMATT LIMITED ..... APPELLANT

AND

FELIX MIHESO MASHETI ..... RESPONDENT

(Being an appeal from the judgment and decree issued in Nakuru Chief Magistrate's Court ELRC Cause No. 231 of 2021 by Hon. R. Kefa (SPM) delivered on 5th October, 2022)

JUDGMENT

I. Introduction

1. In a decree issued on 16th January, 2024 arising from a judgment delivered on 5th October, 2022 the appellant, the respondent in the lower court, was ordered to compensate the respondent, the claimant in the lower court, as follows –

    1. One month salary in lieu of notice Kshs16,907.90
    2. Underpayment of leave due Kshs6,789.70
    3. Service Gratuity Kshs39,018.00
    4. Unpaid housing allowance Kshs30,434.00
    5. Underpayment of wages Kshs52,630.80
    6. Wages for the days worked Kshs7,153.30
    7. Compensation for unfair termination Kshs202,894.80
    8. Respondent to pay cost of the suit.

2. Dissatisfied with the judgment and decree, the appellant through Munene Chege & Co. Advocates commenced this appeal by way of a memorandum of appeal dated 31st October, 2022 raising the following grounds of appeal –

    1. That the learned trial magistrate misdirected herself by awarding twelve months' compensatory damages that was inordinately high in the circumstances.

    2. That the learned trial magistrate erred in both law and fact in ignoring the guiding principles for the remedies for wrongful termination under section 49 which is awarded to compensate the claimant and not to punish the employer.

    3. That the learned magistrate erred in both law and fact in failing to observe that the respondent adhered to the statutory minimum wage labour regulations thereby wrongfully making an award for both house allowance and underpayments.

    4. That the learned magistrate erred in both law and fact I granting an award for gratuity in absence of evidence of an existing arrangement between the claimant and the respondent.

    5. That the learned trial magistrate erred in fact and law in not analyzing the respondent's evidence on record thereby failing to exercise the trial court's discretion reasonably.

    6. That the learned trial magistrate erred fundamentally in law and in fact in disregarding clear, unequivocal, comprehensive and express provisions of a statute as stipulated under the *Employment Act* thereby arriving at the wrong conclusion.

    7. That the learned trial magistrate erred in both law and fact in finding that the claimant was unfairly terminated from employment despite overwhelming evidence to demonstrate otherwise.

    8. That the learned trial magistrate misdirected herself in disregarding evidence and failing to take into account submissions filed by the appellant's and consequently arriving at the wrong conclusion.

    9. That the learned magistrate's findings are totally unsupported in law.

3. The appellant is seeking the following reliefs –

    1. That this appeal be allowed.

    2. That the costs of the appeal be awarded to the appellants.

4. The respondent opposed the appeal through Magatta & Njogu Advocates.

5. By consent the appeal was canvassed by way of written submissions. Counsel for the appellant, Miss Daye, filed written submissions on 21st March, 2024 and the respondent's counsel, Mr. Magatta, filed on 11th June, 2024.

II. SUBMISSIONS BY COUNSEL

6. On the one hand, counsel for the appellant condensed the grounds of appeal into three issues – Whether the trial magistrate erred in law and in fact in failing to find that the respondent had lawfully resigned from employment and therefore could not be unfairly terminated from employment; Whether the trial magistrate erred and misdirected herself by ignoring the guiding principles for remedies of wrongful termination thereby making an award of 12 months compensatory damages that was inordinately high in the circumstances; and, Whether the trial magistrate fundamentally erred

in law and fact by disregarding the evidence on record thereby arriving at the wrong conclusion in awarding reliefs that were not merited.

7. On the first issue, it is submitted that the respondent was engaged as a general labourer in 2006 earning a monthly wage of Kshs10,107/=. It is submitted that the respondent in his testimony before the trial court conceded that he was not a shop attendant and confirmed that he was paid overtime and house allowance – See Page 68 of the record of appeal. It is submitted that the respondent on 3rd March, 2021 sought four days' sick off that was granted by the appellant. The respondent was expected to resume duty on 7th March, 2021 but he did not as evidenced by the respondent's muster roll (Exhibit 2) – See Page 28 of the record of appeal. It is submitted that the appellant summoned the respondent to inquire about his absence from work, only for the respondent to show up after the normal working hours at 5.30 pm. It is submitted that the respondent was directed to report the following day to show cause why disciplinary action could not be meted out against him.

8. It is submitted that the respondent failed to show up the next day, and only appeared on 11th March, 2021, and informed the appellant's director that he could not continue working allegedly on medical grounds. It is submitted that the respondent had previously resigned in 2015 on similar grounds. It is further submitted that on that basis, a termination notice bearing the ground posed by the respondent was issued effective 1st March, 2021. It is submitted that the respondent confirmed receipt of terminal dues of Kshs45,315/=. It is further submitted that by dint of Section 35 of the *Employment Act* (the Act), a mandatory one-month termination notice or a one-month salary in lieu is payable where salary was paid monthly unless a longer notice period is provided for in a contract. It is submitted that only an employer is mandated to issue a termination notice where termination is contemplated, but in case an employee wishes to leave employment, such an employee is mandated to issue a notice or pay the employer one-month's salary in lieu of notice. It is submitted that the respondent having willingly resigned, he was mandated to pay the appellant one month's salary in lieu of notice. It is submitted that the trial court erred on relying on the protest letter dated 11th March, 2021 bearing the stamp of the Nakuru County Labour office, without proof that the same was served upon the appellant.

9. It is submitted that the appellant was not invited to any consultative meeting to discuss the contents of the aforesaid letter. It is submitted that the respondent having reigned there was no employment relationship between him and the appellant, and thus unfair termination could not arise. The court is urged to be guided by the reasoning in David Njuguna Mungai Versus Registered Trustees of Sisters of Mercy T/A Mater Hospital where Nduma J cited Dludlu V Emalangeni Food Industries (IC Case No. 47/2004) and found that constructive dismissal could not arise where the applicant had unilaterally resigned. It is submitted that the trial court erred in holding that there was unfair termination despite proof that the respondent had resigned and received terminal dues. It is submitted that the appellant reasonably believed that the respondent had resigned and on a balance of probabilities proceeded to terminate the respondent's services. To buttress this assertion, the court is urged to be persuaded by the reasoning in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others (2019) eKLR and find and hold that the appellant acted reasonably.

10. On the second issue, it is submitted that the respondent did not meet the threshold under Section 49 of the Act for an award of maximum compensation. It is submitted that the award made is inordinately high and punitive yet the respondent violated the appellants' regulations by avoiding disciplinary proceedings by opting to resign. It is submitted that the respondent's conduct eroded the trust between him and the appellant. It is submitted that the respondent's resignation inconvenienced the appellant who was forced to re-assign the respondent's roles to his colleagues. It is submitted that no replacement for the respondent had been employed during the trial period. It is submitted that the respondent issued an oral resignation and purported he would return after 3 months. It is submitted that the

respondent had previously resigned on medical grounds and returned to employment after a year's rest – See Pages 46 and 47 of the record of appeal. The court is invited to consider the reasoning in Hema Hospital versus Wilson Makongo Marwa (2015) eKLR; Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR; Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR; and Trevar Marambe v For You Chinese Restaurant (2021) eKLR and find and hold that compensation as a remedy is not aimed at unjustly enriching a party but to redress an economic injury. The court is urged to find that the 12 months' compensation is punitive and excessive in the circumstances of the cause.

11. On the third issue, it is submitted that the trial court failed to evaluate the appellant's evidence by failing to acknowledge that the respondent's wages were paid in his terminal dues of Kshs43,515. The court is asked to deduct the paid dues from the award made by the trial court – See pages 43 & 44 of the record of appeal.

12. It is further submitted that the trial court failed to consider the principles under Section 49(4) of the Act in awarding notice pay and compensation. It is submitted that the trial court failed to consider the appellant's evidence that the respondent upon re-engagement was paid the basic wage of Kshs12,522, which was exclusive of house allowance and overtime. It is submitted that contrary to the respondent's assertion that he received Kshs10,107 per month, he was paid an hourly wage, exclusive of house allowance and overtime with his wages fluctuating based on hours worked – See pages 43, 44 & 68 of the record of appeal. The court is urged to find that the trial court misdirected itself in awarding underpayment on wages and leave dues of Kshs52,630.80 and Kshss6,789/= respectively. It is submitted that the trial court erred in awarding a house allowance of Kshs30,434 despite the respondent's testimony that he had received housing allowance and overtime – See page 68 of the record of appeal.

13. On the wages for days worked from 1st to 11th March, 2021 it is submitted that the respondent took sick off for four days from 3rd March, 2021 but failed to report back to work on 7th March, 2021. It is submitted that the respondent always signed the muster roll during his employment and his allegation to the contrary is false. It is submitted that in the absence of record that he was at work from 7th March, 2021 the respondent is not entitled to pay for work not done. The court is asked to set aside the award as the same amounts to unjust enrichment to the respondent.

14. On service pay, it is submitted that under Section 35 of the Act, the appellant produced statements from 2017 to 2019 of National Social Security Fund (NSSF) remittances for its employees. It is submitted that the respondent failed to adduce evidence of the months on which his NSSF remittances were not made, and thus the said award should be set aside. The court is urged to be persuaded by the reasoning in Kenneth Onialo V Majlis Resort LAMU T/A Majlis Lamu Ltd (2022) eKLR and Hassanath Wanjiku Versus Vanela House of Coffees (2018) eKLR. It is submitted that in the event the court upholds the finding that termination was unfair, a 3 months' salary compensation is ideal subject to statutory deductions.

15. Based on the foregoing, the court is urged to allow the appeal and each party ordered to bear own costs.

16. On the other hand, counsel for the respondent raised two issues – Did the respondent resign or was he dismissed from employment unfairly and wrongfully; and, Are the reliefs that were awarded merited.

17. On the first issue on resignation, it is submitted that the respondent never resigned as alleged by the appellant and if he indeed had resigned, he could not have issued a protest letter dated 11th March, 2021. It is submitted that according to the testimony of Mr. Rashik Karania(RW1) an employee was required to issue a notice before resigning, nothing prevented the appellant from instructing the respondent to

write a resignation letter. Citing Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR, it is submitted that for termination to pass the fairness test, there must be proof that both substantive justification and procedural fairness were met. It is submitted that no good reason was adduced for dismissing the respondent apart from the alleged resignation. It is submitted further that no hearing was accorded to the respondent pursuant to Sections 43(1) & 45(2) of the Act before the appellant was summarily dismissed.

18. On reliefs, it is submitted that the trial court rightly and lawfully exercised its discretion in awarding 12 months' maximum compensation having considered that the respondent had served for appellant for 14 years. It is submitted that the respondent never contributed to his dismissal as he could not work while sick. The court is urged to consider the reasoning in Jane Gesare Masese V Board of Management Naikuru Pag Primary School (2021) eKLR and uphold the maximum compensation as awarded by the trial court.

19. It is submitted that on the award of service pay, despite the production of the NSSF record for 2017, no records were availed for 2018 to 2021. It is submitted that the trial court was right in awarding service pay. On underpayments, it is submitted that the appellant in the certificate of service indicated that the respondent was a shop attendant. It is submitted that the assertion that the respondent received a salary of Kshs10,107 was not denied. It is further submitted that the allegation that the respondent was earning Ksh12,522/= a month was not proved during the trial. It is further submitted that the appellant as a shop attendant was underpaid.

20. It is submitted that according to the Regulation of Wages (General) (Amendment) Orders for 2015, 2017 & 2018 the respondent was entitled to a monthly minimum wage of kshs13,446.40, Kshs16,102.75 and Kshs16,907.90 respectively and not Ksh10,107/=. The court is urged to consider the reasoning in Simeon Omariba Orangi v Robinson Investment Limited (2019) eKLR and find that an employer is obligated to pay the legal and minimum wage despite the acceptance of an underpayment by an employee. It is submitted that the respondent is entitled to wages for the days worked from 1st to 11th March, 2021 covering the period when he fell ill and his dismissal. It is submitted that respondent resumed duty on 7th March 2021. It is submitted that the respondent failed to sign the muster roll as this supervisor had kept the same at his house and asserts that he is entitled to the attendant pro rata pay.

21. On the unpaid house allowance, it is submitted that the respondent's monthly wage of Kshs10,107/= was below the minimum wage and thus could not have included the housing allowance. It is submitted that in the absence of records that the respondent was paid housing allowance, the respondent is entitled to the same as awarded.

22. The court is urged to uphold the finding and holding of the lower court and dismiss the appeal with costs.

III. ISSUES FOR DETERMINATION

23. 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 both parties as summarized above. The following issues commend themselves to the court for determination –

    a. What was the nature and duration of the employment relationship between the appellant and the respondent?

    b. Was the respondent terminated or did he resign?

    c. If the respondent was terminated, was the termination unfair and unlawful?

d. Did the trial court arrive at the correct decision in regard to the termination and reliefs awarded?

e. What are the appropriate orders for this court make in regard to the above issues?

f. Costs.

IV. Employment

24. As the first appellate court, this court is obligated to evaluate the evidence and arrive at its own conclusions but bearing in mind that it did not hear and record the evidence in the trial – See Selle V Associated Motor Boat Co. Ltd (1968) E.A 123.

25. The appellant produced a letter of appointment dated 1st May, 2007 to the effect that the respondent was engaged as a general labourer. The letter shows that the respondent duly signed the said letter – See pages 29 & 30 of the record of appeal. The respondent testified that he commenced working on 1st June, 2006 and having seen or signed the said letter of appointment adduced by the appellant –See Page 68 of the record of appeal. The appellant produced a certificate of service received by the respondent on 11th March, 2021 indicating that he was employed on 1st July, 2006 and was working as a shop attendant – See Pages 17 & 45 of the record of appeal. The respondent pleaded that he was engaged as a shop attendant on 1st July, 2006 – See page 4 of the record of appeal. This assertion conforms to the certificate of service issued by the appellant.

26. The court has considered the letter of appointment dated 1st May, 2007 and the Certificate of Service issued on 11th March, 2021 all issued by the appellant. The two documents bear contradictory information. The respondent's counsel has invited the Court to apply the contra proferentem rule and thus construe that the respondent was employed as a shop attendant and not a general labourer. The contra proferentem rule applies in cases of ambiguity in contracts against the party who drew the documents. The trial court applied this rule and found that due to the ambiguity in the appellant's documents, the respondent was entitled to the assumption that he was engaged as a shop attendant from 1st July, 2006. The court finds no lawful reason to interfere with this finding.

27. The appellant produced a letter dated 8th October, 2015 indicating that the respondent applied for resignation on medical grounds – See page 46 of the record of appeal. Subsequently, compensation for leave days and traveling allowance was paid to the respondent for the period from 2012 to December 2015, a period of 4 years. The said document showed that the respondent acknowledged receipt of the dues on 22nd February, 2016 – See Page 47 of the record of appeal.

28. During the hearing before the trial court, the respondent testified that he did not write the letter dated 8th October, 2015. The said letter and the payment of dues thereof signed by the respondent on 22nd February 2016 were produced by the appellant's witness Rasik (RW1) on 17th August, 2022 as per the appellant's list of documents dated 1st September, 2021 – See page 69 of the record of appeal. There was no objection to the production of the aforementioned documents by the respondent. When the appellant's list of documents was filed in court, the respondent had an opportunity to call for expert evidence to quell any assumption that the said documents were indeed genuine and factual. The employer, the appellant, is obligated under Section 74 of the Act to keep records of employment while under Section 75 of the Act a penal sanction is imposed. No evidence was adduced by the respondent that the documents produced by the appellant were false. There was no denial that the respondent received payment of terminal dues on 22nd February, 2016.

29. Nevertheless, there was no proof that the appellant accepted the respondent's resignation on 8th October, 2015 or that the respondent resigned as alleged. Moreover, if the respondent resigned and came back after a year, there is no proof that a new contract was issued to the respondent. In fact, the appellant relied on the initial appointment letter as proof of employment. If indeed the respondent had resigned and come back in 2017, a new contract could have been drawn to that effect or an addendum drafted and executed to that effect. The court has perused the document of payment signed on 22nd February, 2016 and the same indicated that leave was payable until December, 2015. If the Respondent had resigned on 8th October, 2015, then the appellant could not have paid for leave in December, 2015. In the circumstances the court finds that the respondent's employment was continuous from 1st July, 2006 until termination.

V. Dismissal

30. The respondent's case is that on 3rd March, 2021 he reported to work and fell sick. He requested for sick-off which request was granted and he proceeded to the hospital. He visited the Rift Valley Provincial General Hospital (PGH) and he was given four days' sick-off – See page 15 of the record of appeal.

31. According to the respondent, he resumed duty on 7th March, 2021 and the employment relationship ended on 11th March 2021 when his supervisor summoned him and informed him that he had been terminated allegedly for having refused to work on the days when he was sick. The appellant asserts that the respondent went on sick-off on 3rd March, 2021 but when he was expected to report back on 7th March, 2021 he reported to work at 5.30 pm alleging that he was unwilling to work for the appellant. The appellant's case is that the respondent was asked to come the following day but he failed to show up until 11th March, 2021 when he indicated that he could no longer work, citing health reasons. The appellant's case is that there was no need for a show-cause letter to issue as the respondent indicated he had no intention working for the appellant. It is submitted that the respondent was accordingly paid his terminal dues which he acknowledged.

32. During the trial, RW1 conceded that no resignation letter was written by the respondent – See Page 67 of the record of appeal. The respondent testified before the trial court that he never resigned and had only signed the terminal dues form as he had been informed to do so that his dues could be paid. He denied ever informing his employer that he could not work due alleged poor health.

33. The letter of termination addressed to the respondent read as follows –

Kipmatt Limited

PO BOX 2246-20100

Nakuru

To Mr. Felix Mihoso Mushati

ID NO.22XXXX664

RE: Termination on Employment

Further to your discussion with the director, in which you expressed your desire to terminate your employment with the company management, after deliberation, has agreed to release you from its service with effect from 1st March, 2021.

Your dues are as follows:

PARA 1.

Leave due if any.

PARA 2.

Bonus as per the company consent.

Kindly make arrangements to collect the same from the company's office as soon as possible.

Yours faithfully.

For Kipmatt Ltd

11/3/2021

Mr. Rashik K. Shh

Director"

34. The court notes that there is no indication in the letter of termination that the respondent accepted contents therein or indeed received the letter. The appellant was obligated to inform the respondent to write a resignation letter before it issued the notice of termination. The appellant's case is that the respondent absconded duty from 7th to 10th March, 2021 until he resigned on 11th March, 2021. No show-cause was issued to the respondent for absenting himself from work without leave which is a ground for summary dismissal under Section 44(4)(a) of the Act. In fact, the appellant pleaded that – "disciplinary proceedings were short-circuited as there arose no need to issue a notice to show cause letter as the claimant was disinterested in working for the respondent." – See paragraph *11* on page 23 of the record of appeal.

35. In the absence of a letter of resignation or proof that the respondent accepted the contents of the notice of termination, the appellant failed to demonstrate and proof that it had a valid reason to terminate the respondent. The respondent protested the purported termination through his letter dated 11th March, 2021. The said letter was served upon the labour office. Although the appellant alleges that it did not receive a copy of the protest letter, an employee who had purportedly resigned would not reasonably protest the notice of termination.

36. Based on the reasonableness test enumerated in British Leyland UK Limited v Swift (1981) I.R.L.R 91, a reasonable employer would have implored upon the employee to write a letter of resignation if he indeed wished to resign. The reason for termination was that the respondent allegedly expressed a desire to resign. In the absence of a disciplinary hearing on his alleged intention to resign, there was no valid reason to terminate the respondent. Sections 43, 45 & 47 of the Act outlaw capricious and whimsical termination of a contract of employment.

37. The court finds and holds that the termination was unfair and unlawful for lack of both substantive and procedural fairness. In that regard, the trial lower court arrived at the right decision and the court has no reason(s) for disturbing that finding and holding.

VI. Reliefs

38. The trial lower court awarded the respondent as enumerated in the introductory part of this judgment.

39. On the award of notice pay, the appellant submits that the respondent resigned on his own volition and is not entitled to notice pay. The respondent submits that his termination was unlawful and thus he was entitled to notice pay. The court has found that the termination was wrongful and unlawful and thus the respondent is entitled to notice pay. The respondent testified that he was earning a monthly salary of Kshs10,107/=. The appellant's witness RW1 testified that the respondent was earning Kshs14,400/

= as basic pay plus overtime as indicated in the muster roll (D-Exh-2) – See page 66 of the record of appeal. The muster roll appearing in the record of appeal on pages 32 to 41 does not indicate any basic pay.

40. However, the court perused the lower court file and noted that on the overleaf of the muster roll there is a handwritten calculation of the basic pay that the respondent was paid. One handwritten calculation for 30th January, 2021 indicated that the basic pay payable was Kshs12,523/=. There is no proof that the respondent received the said amount although a signature is appended thereto. On a different page, the basic pay is indicated as Kshs11,927/=. The appellant's witness, RW1, testified that the respondent was paid in cash and he would sign out on petty cash voucher – See page 66 of the record of appeal. The court finds and holds that on a balance of probabilities the respondent was a shop attendant. The respondent in submissions anchored his claim on basic pay on the assertion that he was an ungraded artisan under the Regulation of Wages (general) Amendment *Orders of 2015*, 2017 & 2018.

41. In Fredrick Ochieng Odero v Nakuru Teachers Training College [2018] eKLR Radido J stated that –

> "29. Ungraded artisan is defined as one who carries out simple repairs and maintenance work with a reasonable proficiency in a particular trade or trades although not in possession of any Trade Test Certificate."

42. The appellant's witness RW1 testified that the respondent packed goods, assisted in the shop, and aided in the removal of items from shelves – See page 67 of the record of appeal. It is therefore logical that the respondent fits the bill of an ungraded artisan. At the time of his dismissal on 11th March, 2021 the basic pay payable was Kshs16,907.90 under the Regulation of Wages (General) Amendment Order, 2018. the trial court awarded the said Kshs16,907.90 and the court has no reason for disturbing that award.

43. On the award for underpayment of leave due the court awarded Kshs6789.70 as pleaded. The respondent prayed for leave from April, 2019 to February, 2021 a period of 23 months. He pleaded that he had been paid Kshs19,385.70 and the difference thereof for the underpaid leave pay. He claimed for the difference of Kshs6,789.70. No record was produced by the appellant to disapprove this prayer – See page 44 of the record of appeal. The trial court awarded the said Kshs6,789.70 and the court has no reason for disturbing that award.

44. The trial court granted service pay to the respondent for the period from 2018 to 2021. The trial court observed that the respondent had only produced National Social Security Fund (NSSF) statement for the period up to December 2017. Under Section 35(5) of the Act – "An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed'. However, under Section 35(6) of the Act – "This section shall not apply where an employee is a member of the National Social Security Fund." This section does not indicate that in case NSSF remittances are not made an employee becomes entitled to service pay. The import of the section is that as long as an employee is a member of the NSSF they are disqualified from earning service pay unless a Collective Bargaining Agreement (CBA) provides otherwise.

45. The respondent does not seek the remittance of his NSSF remittances for the period the appellant allegedly failed to remit, but rather seeks service pay. Under the NSSF Act (Cap 258) there are statutory mechanisms for the recovery of monies not remitted. The respondent ought to pursue enforcement with the NSSF for the remittance of his NSSF dues. The court finds that the trial court misdirected itself in awarding service pay/gratuity and sets aside the award. To state the obvious, there is a difference between gratuity and service pay.

46. The trial court awarded underpayment for wages and house allowance for twelve months on the premise that since they were a continuing injury and the suit had been filed within 12 months statutory timeline. The trial court cited Stephen Kamau Karanja v Family Bank Ltd (2014) eKLR where the court found that an underpayment of wages is a continuing injury and the cause of action thereof would be statute barred twelve months after the cessation thereof.

47. The court has critically examined the above awards on underpaid wages and unpaid house allowances and finds that the awards accrued to the respondent at the end of each month but were not paid or the breach remedied. The failure by the appellant to pay the salary on scale and the attendant house allowance constituted a continuing injury as rightly held by the trial magistrate. Section 89 of the Act provides –

> " Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof". [Emphasis added]

48. A claim for the above reliefs ought to have been filed in court within 12 months of termination. The court notes that the respondent's termination was on 11th March, 2021 and the cause was filed on 26th July, 2021 which is four months and fifteen days after termination and within the time limit of 12 months.

49. The respondent's claim spans from 2015. It was not disputed that the wages paid to the respondent were below those payable to an ungraded artisan. The respondent's claim for underpayment was filed within the statutory limit and the trial magistrate did not provide a reason why the claim for the previous years was not considered. The respondent was entitled to the underpayments as prayed as the cause of action arose after the termination of his employment on 11th March, 2021.

50. However, there is no cross-appeal on record by the respondent and as such the award by the trial lower court of Kshs30,434/= shall remain undisturbed.

51. The trial court awarded Kshs7,153.30 for days worked from 1st to 11th March, 2021. The appellant's witness RW1 testified that the respondent did not resume work on 7th March, 2021 but only came to work after working hours and stated that he wished to stop working. RW1 testified that the respondent never reported to work until when he showed up to resign on 11th March, 2021. The appellant produced the muster roll to prove that the respondent did not resume work. However, the respondent remained an employee of the appellant until the day of dismissal on 11th March 2012. For that reason, the award of Kshs7,153.30 shall remain as the court has no reason to disturb the same.

52. On the award of maximum compensation equivalent to 12 months' salary for the unfair and unlawful termination the court reiterates that compensation is intended to remedy the loss or damage that an employee suffers upon unfair and unlawful termination or dismissal due to 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 enrichment of the employee or as a punishment to the employer. In awarding the maximum compensation the trial magistrate considered the respondent's length of service with the appellant subject to the conditions under Section 49(4) of the Act. The court agrees with the trial court that the respondent was unfairly terminated. There is no evidence that he contributed to his termination. The parties have not expressed an intention to disturb the award made by the trial court. It was neither intended to unjustly enrich the respondent nor to punish the appellant.

VII. Orders

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

a. The appeal shall succeed partially to the extent that the service pay of Kshs39,018/= is hereby set aside.

b. A new decree shall issue as follows –

   i. Total award as made by the trial court Kshs355,828.50

      Less Kshs39,018.00

   ii. Balance due Kshs316,810.50

      * The award is subject to statutory deductions.

c. The order for costs to the respondent (claimant) in the lower court remains.

d. Each party shall meet own costs in the appeal.

e. The amount awarded as above shall earn interest from the date of the judgment of the lower court till payment in full.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 21ST DAY OF NOVEMBER,2024.

.....

DAVID NDERITU

JUDGE