



**Protective Custody Limited v Mwangu (Employment and Labour Relations Appeal E236 of 2023) [2024] KEELRC 13613 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13613 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E236 OF 2023**

**JW KELI, J  
DECEMBER 18, 2024**

**BETWEEN**

**PROTECTIVE CUSTODY LIMITED ..... APPELLANT**

**AND**

**MICHAEL SHIKUKU MWANGU ..... RESPONDENT**

*(An Appeal from the Judgment & Decree of the Honourable C.K. Cheptoo, P.M. dated and delivered on 15<sup>th</sup> April 2021 in Nairobi CMELRC Cause No. 2078 of 2019)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment & Decree of the Honourable C.K. Cheptoo, P.M. dated and delivered on 15<sup>th</sup> April, 2021 in Nairobi CMELRC Cause No. 2078 of 2019 filed the Memorandum of Appeal dated 14<sup>th</sup> November, 2023 and Record of Appeal dated 24<sup>th</sup> January 2024 and received in Court on even date seeking the following reliefs:-
  - i. The judgment of the lower court awarding Kshs. 710,401.84 to the claimant, costs of the suit and interest be set aside.
  - ii. The claimant's entire claim be dismissed with costs.
  - iii. Costs of the lower court and costs of the appeal.
  - iv. Any other or further orders as the appellate court may find just to grant.
2. The Appeal was premised on the following grounds: -
  - a. That the learned trial Magistrate erred in law and in fact in finding that the claimant had been unfairly terminated.



- b. That the learned trial Magistrate erred in fact and in law by awarding the claimant's six months salary compensation for unfair termination yet the same is not supported by the evidence on record.
- c. That the learned trial Magistrate erred in fact and in law by awarding the claimant underpayment yet the same is not supported by the evidence on record.
- d. That the learned trial Magistrate erred in fact and in law by awarding the claimant leave pay yet the same is not supported by the evidence on record.
- e. That the learned trial Magistrate erred in fact and in law by awarding the claimant housing allowance yet the same is not supported by the evidence on record.
- f. That the learned trial Magistrate erred in law by shifting the burden of proof to the respondent and in weighing the respondent's evidence on a higher scale than that of the balance of probabilities.
- g. The learned trial Magistrate judgment is not supported by the evidence on record and the applicable law.
- h. The learned trial Magistrate erred in law in awarding costs and interest to the claimant.

### **Background to the appeal**

- 3. The Claimant vide statement of claim dated 20<sup>th</sup> August 2019 sought a declaration that his termination was unprocedural and amounted to unfair termination and further sought payment of salary for 15 days worked in March 2019, underpayment, notice pay, house allowance, leave dates, compensation for unfair termination and certificate of service (page 4 of the Record of Appeal). The case was heard with the claimant as a witness and the defense calling one witness of fact (pages 93-96 of the Record of Appeal). The parties filed written submissions on the issues for determination after the hearing. On pages 73-79 of the Record of Appeal were the claimant's written submissions and on pages 81-85 were the Respondent's written submissions.
- 4. The Learned Trial Magistrate delivered judgment in the claim on the 19<sup>th</sup> October 2023 in favour of the Claimant and issued declaration that the respondent's act of terminating the claimant's employment was unprocedural and amounted to unfair termination. The court further awarded the claimant total sum of Ksh. 710,401.84 comprised of six months' salary for unfair termination applying the minimum wages for the total sum of Kshs. 90,852/-, underpayment for 98 months' period of work, house allowance and untaken leave for the period of work. The claimant was also awarded costs of the suit and interest.

### **Written submissions**

- 5. The appeal was canvassed by way of written submissions. The appellants written submissions drawn by Njuguna & partners were dated 4<sup>th</sup> July 2024 and received in court on 1<sup>st</sup> July 2024. The Respondent's written submissions drawn by Lemmy Regau & Co. Advocates were dated 19<sup>th</sup> August 2024 and received in court on the 20<sup>th</sup> August 2024.

### **Determination**

- 6. The court is sitting on first appeal. The duty of the court sitting as the first appellate court is as stated in authority cited by the Respondent in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) "This being a first appeal, we are



reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. “ That court cited with approval case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

### **Issues for determination**

7. The Appellant addressed the following issues in its written submissions: -
  - a. Whether the Learned Magistrate erred in law and fact in finding the respondent had been unfairly terminated (Ground 1).
  - b. Whether the Learned Magistrate erred in law and fact in awarding the respondent terminal dues (Grounds 2,3,4,5 and 7).
8. The Respondent addressed the following issues in written submissions: -
  - a. Whether the claimant was terminated lawfully
  - b. Whether the claimant was entitled to reliefs sought
9. The Court took into consideration the issues addressed by the parties and framed the issues for determination in the appeal as follows: -
  - a. Whether the Learned Magistrate erred in law and fact in finding the respondent had been unfairly terminated.
  - b. Whether the claimant was entitled to reliefs granted.

### **Whether the Learned Magistrate erred in law and fact in finding the Respondent had been unfairly terminated.**

10. The appellant submits that the trial court held that there was no proof of service of letters dated 6<sup>th</sup> February 2019 and 13<sup>th</sup> March 2019 upon the respondent. That due to lack of service the claimant’s employment was terminated vide a phone call as per his evidence in chief. That the trial court failed to consider the respondent contradicted himself during cross-examination. While he alleged to have been terminated vide phone call during cross-examination he stated he had no phone. In evidence in chief the Respondent stated he was called by Robert (page 8 of the Record of Appeal) and during cross-examination he changed to being called by Rodgers (page 94 of the Record of Appeal). The Respondent lied he had started working in January 2011 while his application and biodata indicated January 2012. In the upshot, the appellant submitted that the contradictions by the respondent did not make him a reliable witness. The respondent was not terminated but following withdrawal of the client services, vide letter dated 6<sup>th</sup> February 2019 the respondent was informed his assignment would expire by the 28<sup>th</sup> February 2019 and was advised to report to the regional office for deployment (page 68 of the Record of Appeal). On 1<sup>st</sup> March 2019, the Respondent failed to report for deployment or



return calls. Due to his desertion of duty, the appellant demanded the return all the appellant's property in his possession if he did not wish to work for the claimant (page 69 of the Record of Appeal).

11. The appellant submits that the respondent in written submissions before the lower court dropped the reliefs sought of declaration of unfair termination, notice pay, and compensation for unfair termination. The appellant submits that there was no termination hence no damages were due.

### **Response**

12. The Respondent in written submission submits that he did not submit on whether he was terminated fairly or not. That submissions are not pleadings. That the appellant has not demonstrated how the court erred in arriving at wrong conclusion.

### **Decision on issue 1.**

13. The Court finds that the Respondent indeed dropped the issue of unfair termination in his written submissions before the Trial Court (page 74 of the Record of Appeal). Specifically he dropped as his claim the declaration that his employment was terminated unlawfully, notice pay and compensation for unfair termination. On perusal of the judgment the court finds that the Learned Trial Magistrate did not factor these written submissions of the claimant. The Respondent submits that submissions are not pleadings. That is trite law. The court notes that the request to drop a claim in submissions is a position of a party on their claim. The submissions were served on the respondent/appellant communicating the wish of the claimant.
14. The court having held it is trite that the submissions are not pleadings proceeds to re-evaluate the evidence on record. The Learned Trial Magistrate, on page 100 of the Record of Appeal, believed the claimant was called by his supervisor who informed him he had been terminated without procedural fairness. During cross-examination, the claimant told the court he had no phone to use (page 94 of the Record of Appeal). The court holds that the basis of the finding of termination was in error in the circumstances. The Trial Magistrate on relief sought of salary for 15 days worked in March 2019 disallowed the same on basis that the Respondent had not reported to the regional office for deployment.
15. Under section 47(5) of the *Employment Act* the employees bear the burden to prove the termination and its unfairness. The section reads:- "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment wrongful dismissal shall rest on the employer." In the instant case and from the evidence before the trial court the Court holds that Respondent's service was not terminated. The client terminated services offered by the appellant through its employees who included the Respondent and that he failed to report for deployment as held by the Trial Court.
16. The Appellant told the trial court that the Respondent deserted duty. The court agreed with the trial court that procedural fairness ought to have been followed in separation with the employee. This applied even in the case of desertion. Section 41 of *Employment Act* is couched in a mandatory manner to wit:-
  - "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



- (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.” It was not in dispute that the appellant had not subjected the Respondent to procedural fairness after the alleged desertion. In the circumstances, the only relief due for procedural fairness was Notice Pay in lieu as the reasons for desertion of duty were valid. Indeed the Trial Court held that the Respondent did not report to the headquarters of the Appellant for deployment. The court sets aside the award for six months compensation as it was not supported by the evidence before the Trial Court and substitutes the award with notice pay of 1 month for procedural unfairness for the sum of Kshs. 15,141.95.

**Issue2 -Whether the Respondent was entitled reliefs granted.**

17. The trial court further entered judgment for the claimant for the total sum of Kshs. 710,401.84 itemized as follows:-

Unfair termination Kshs. 90,852

Underpayment- Kshs. 388,686.90

House allowance – Kshs. 148,603.04

Untaken leave – Kshs. 82,259.90(see pages 102-104 of the record)

18. The court then proceeds to evaluate the awards under the headings of underpayment, house allowance, and untaken leave having already decided on the compensation

**Underpayment- Kshs. 388,686.90/-**

19. The Appellant raised a ground of appeal that the learned Trial Magistrate erred in fact and in law by awarding the Respondent underpayment yet the same was not supported by the evidence on record. In submissions, the appellant submits that the respondent failed to give basis of the figures claimed as underpayment. He did not attach the requisite minimum wage orders for the respective orders. That the respondent produced an electronically generated bank statement purported to be from Equity Bank (page 69 of the record). The appellant submits that the said statement was not certified as a true copy of the original bank statement contrary to the provisions of section 78 A(4) of the *Evidence Act*. To buttress this submission the Appellant relied on the decision in the case of Gilphine Kaleji bh Muchinyi v Peter Shikuku Muchinyi & another (2008) e KLR where the court stated :- “ The banks statements are electronically and digitally processed and ought to be produced under section 78 A 4 of the *Evidence Act*.” The appellant submits that the said bank statement was unverified and its contents not proved. In any case, the statement covers the period of 1<sup>st</sup> January 2028 to 30<sup>th</sup> April 2018 but the claimant confirmed that the entries in the statement only span 6<sup>th</sup> January 2028 to 12<sup>th</sup> February 2018, one month (page 94 of the record). The appellant submits that the underpayment was not justified.
20. The Respondent in response submitted that the Appellant did not provide the employee record to assist the Trial Court which it keeps according to section 74 of the *Employment Act* as held in Maureen Wandera Egesa v Inter-security Service Limited where the court stated that:-<sup>8</sup> 8. The respondent has admitted that they had employed the claimant. There are however no records attached with regard to the work records of the claimant. Section 74 of the *Employment Act* sets out the requirements thus;

74.



(1) an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

9. Such a work records should include the payable salary and its duration; the statutory deductions made on the salary; hours of work setting out the rest day/ s; annual leave taken or due and any records for any leave taken with regard to sickness or as the case may be. Such records are to be kept by the employer and where there is a dispute file before this court by an employee challenging the non-payment of any dues, such a record must be produced by the employer. Section 74(1) (I) also requires that;

i. Where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee [must be set out].” The Respondent submitted that the court in the said decision held that the effect of failing to produce the records must be interpreted to the advantage of the employee.

21. The Respondent submitted that he pleaded he was paid Kshs. 7000 per month which after statutory deduction was remitted Kshs, 5022.68 as per the bank statement which was not controverted. That he was underpaid under the Wages Orders of 2011 to 2018 which he tabulated to justify the award.

#### **Decision on the underpayment.**

22. CW-Exh 1 was the bank statement which the court found he was cross-examined on and its admission was not challenged (page 94 of the Record of Appeal). The Trial Magistrate noted CW-Exh 1 was not rebutted. The Trial Court further relied on the decision of the court of appeal in *The German School society & another v Ohany & another* (2023) to hold the claim was not time barred under section 90 of the *Employment Act* being a continuing injury claim filed within 12 months of termination of services.

23. It is a basic condition of employment for payment of not less than the minimum statutory wages as stipulated in the general wages order regulations issued from time to time. The respondent stated he was underpaid. The award as per submission’s of the respondent was per general wages orders of 2011 to 2018. Section 26(2) of the *Employment Act* provides for basic conditions of work to wit:- “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 Employment and Labour Relations 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.”

24. The court holds that no contrary evidence on the general wage orders was produced to prove the award on underpayment was wrong. The court holds that it may take judicial notice of statutory instruments like General Wages (Orders)Regulations under section 59 and 60 of the *Evidence Act* where there is a claim of underpayment even when the Orders not produced by the parties. The production and admission of the bank statement as prove of salary paid having not been challenged before the trial court cannot be an issue at appeal. The court finds that the Respondent having laid basis of underpayment in pleading the salary paid of Kshs. 7000/-, the employer had the burden to prove the Respondent was not underpaid by production of employment records on salary paid in the period of employment according to section 74 of the *Employment Act* failing which the trial court was in order to interpret the salary payment to the advantage of the employee as held in *Maureen Wandera*



Egesa v Inter-security Service Limited(supra) . The court finds no basis to disturb the award of the Trial Learned Magistrate on underpayment.

### **Housing – Kshs. 148,603.04**

25. The Appellant contended that the Learned Trial Magistrate erred in fact and in law by awarding the claimant housing allowance yet the same was not supported by the evidence on record.
26. The Learned Trial Magistrate held that it was the claimant’s evidence that he was not housed or paid housing allowance during his employment and awarded house allowance of Kshs. 148,603.04 applying the Wages Orders in the period of employment under section 31 of the *Employment Act* to wit:- “(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”
27. The appellant submits that it provided housing for the respondent as per requirement of section 31(1) of the *Employment Act*. That vide letter dated 5<sup>th</sup> July 2019 it informed the respondent’s advocates that it had erected a dwelling structure for the appellant next to the station he was guarding which he used with his family (page 26 of the record of appeal). That this position was corroborated by the respondent during cross-examination and re-examination when he confirmed that he lived in the station he was guarding (page 94 of the record of appeal), that the trial court erred in holding that the Respondent was not housed, yet he confirmed the same at re-examination.
28. The Respondent reiterated his testimony in submissions.

### **Decision**

29. The court confirmed that in the response to the demand letter the appellant stated the claimant he was housed at his station. The claimant told the court he stayed at the workplace. He stated he constructed the structure where he stayed but no evidence or basis was laid for him to have constructed at his place of work and the costs of doing so. He told the court. “ I was guarding a booster at Karen. I lived there, I constructed a structure” (page 94 of the Record of Appeal). The court holds that on a balance of probabilities, the respondent was provided with housing in compliance with section 31 (1) of the *Employment Act* which states:- “(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.” The court holds that the Respondent was provided with housing accommodation at his place of work and thus was not entitled to payment of house allowance and the award by the Trial Learned Magistrate is set aside.

### **Leave allowance**

30. The Appellant contended that the Learned Trial Magistrate erred in fact and in law by awarding the Respondent leave allowance yet the same is not supported by the evidence on record. The Respondent told the Trial Court that he did not take leave during his employment. The Learned Trial Magistrate held that the claimant told the court he did not go on leave during his employment by the respondent. That the respondent did not tender evidence to the contrary. The Trial Court held the claimant/ Respondent was entitled to 21 days’ annual leave for years 2012 to 2018 total sum of Kshs. 82,259.
31. In submissions the appellant submitted that the Respondent had a role to prove the claim on balance of probabilities. The respondent did not provide evidence of having not taken leave and relied on



decision of the court in *Rogoli Ole Mandiegi v General Cargo Services Limited* (2016)e KLR and *Asakhulu v West Kenya Sugar Company Limited* (2014)e KLR where the court held:-“The Court holds that the appeal on claims for underpayment and all other reliefs dismissed by trial court have no foundation as per the foregoing re-evaluation of evidence before the trial court. The court finds no evidence was placed before the trial court on claims of underpayment, rest days, public holidays, leave and overtime. These are claims in nature of special damages and must be specifically proved as held in *Twiga Construction Limited v Julius Nyamai Mulatia* [2018] eKLR where Justice Ndolo held as follows:- ‘9. Apart from the claims for notice and leave pay which are admitted by the Respondent in its Defence, the Claimant claims underpayment and compensation for working on public holidays and weekly rest days. He also claims tools allowance at Kshs. 125 per month. All these claims are in the nature of special damages which must be specifically proved. Apart from his word, the Claimant did not provide any evidence to support any of these claims which therefore fail and are dismissed.”

### Decision on untaken leave

32. The claim on untaken leave was not controverted by the respondent. An employee is entitled to annual leave according to section 28 of the *Employment Act* to wit:- “(1) An employee shall be entitled—
- (a) after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay;
  - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.”
33. The appellant relied on their letter of response (page 26 of the record of the record of appeal) on the issue of housing. The letter was in response to the demand letter which also raised the issue of leave. The appellant in response did not address the issue of untaken leave. During cross-examination the witness of the Appellant stated the claimant proceeded on leave. He admitted they had not produced the leave forms. According to section 74 of the *Employment Act* the employer is custodian of record on leave. Leave is a statutory right of the employee. Once the employee pleads he was not afforded leave the burden shifts to the employer as custodial of leave records to discharge. This is unlike claims of overtime which need to be proved strictly as held in *Twiga Construction Limited v Julius Nyamai Mulatia* [2018] cited with approval in *Asakhulu Westkenya Sugar Company limited* (2014)e KLR . The Appellant in the instant case had received demand letter from the claimant’s advocates (page 13 of the Record of Appeal) on leave and the failure to respond to that issue (page 26) or produce the leave records of the Respondent leads the court to conclude that the claim on untaken leave was true on a balance of probabilities as held by the Trial Court.
34. On the compensation for untaken leave section 28 (4) states:- “The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.” What does this section mean? In Nairobi ELRC Cause No 890 of 2015 Vera Nkirote Mburugu Versus Radio Africa Limited (UR) Justice Stella Rutto in a claim for leave for the period of employment 2010 to 2014 applying section 28(4) of the *employment Act* held :-“I am therefore inclined to agree with the claimant to the extent that the question of forfeiture of leave does not arise subject to the same being taken within the 18 months period ascribed under section 28(4) of the *Employment Act*. In this regard, the claimant is entitled to outstanding leave, only for the last 18 months to her exit, which thus falls within the



period starting July, 2013 until January, 2015. From the claimant's leave application forms exhibited by the respondent, the outstanding leave days thus total 22 in number. I must add that the claimant's averment that she applied for leave but was denied, is not substantiated. Thus, the claim dating back to 2010 until June 2013 is denied." In *Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)* [2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment) Justice Radido in a claim for untaken leave for 76 days held : -'25. The Appellant prayed to be awarded the equivalent of 76 months accrued leave in the sum of Kshs 132,757/-.

26. Section 28(4) of the *Employment Act*, 2007 circumscribes how many leave days can be carried forward. The period is only up to 18 months.
27. The Appellant did not suggest or testify that he accumulated leave over 76 months with the approval of the Respondent or that he applied for leave and was denied.
28. The Principal Magistrate did not, therefore, err in declining to award this head of the claim.' I am persuaded to uphold the interpretation of section 28(4) of the *Employment Act* to mean that leave can only be carried forward for period upto 18 months. There was no evidence placed before the Trial Court that the claimant applied for leave and it was denied. Consequently, he was only entitled to leave for upto 18 months for 21 days per annum. The untaken leave pay awarded for entire period is set aside and substituted with award of pay of untaken leave for 2017 and 2018 thus  $21/30 \times 13960.80 (9772.56)$  plus  $21/30 \times 15141.95 (10599.37)$  total sum of Kshs. 20371.93

### **Conclusion and disposition**

35. The court on first appeal having re-evaluated the evidence before the trial court and holds the appeal to be partially successful and sets aside the Judgment & Decree of the Honourable C.K. Cheptoo, P.M. dated and delivered on 19<sup>th</sup> October 2023 in Nairobi CMELRC Cause No.2078 of 2019 between the parties and substitutes it as follows:-

Judgment is entered in favour of the claimant against the respondent as follows:-

Notice pay Kshs. 15,141.95.

Underpayment Kshs. 388,686.90

Untaken leave Kshs. 20,371.93

(The total sum awarded for Kshs. 424,200.78 is payable subject to statutory deduction of PAYE)

Costs and interest to the claimant

36. The appeal being partially successful the court makes no order as to costs at the appeal.
37. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>th</sup> DAY OF DECEMBER, 2024.**

**JEMIMAH KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Caleb



Applicant/Appellant : - Ms. Kinoti

Respondent: Ms. Kariuki

