



**Magongo v Sherman (Employment and Labour Relations Appeal  
E103 of 2024) [2025] KEELRC 2477 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2477 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E103 OF 2024**

**K OCHARO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**MJENI MDIGO MAGONGO ..... APPELLANT**

**AND**

**FEISAL SHERMAN ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The appeal before this Court arises from a judgment by Honourable Gathogo Sogomo, Principal Magistrate, delivered in Mombasa MCELRC Case No. 836 of 2021 on 26th April 2024. The learned Magistrate found that the appellant's case lacked merit and accordingly dismissed it. Aggrieved by the entire decision, the appellant challenges it on the grounds set out in the Memorandum of Appeal filed herein and dated 22nd May 2024.
2. When the appeal came up for directions regarding the disposal of the same, this Court directed that the same be canvassed through written submissions. Subsequently, the parties filed the submissions in accordance with the directions.

**The Appellant's case before the trial court**

3. By a Statement of Claim dated 12th November 2021, the Appellant sued the Respondent in the suit mentioned above and sought the following reliefs;
  - i. A declaration that the termination of her employment was unfair/unlawful;
  - ii. One month's salary in lieu of notice, Kshs. 10,000;
  - iii. Unpaid leave days for 9 years, Kshs. 72,000;
  - iv. Compensation for unfair termination, Kshs. 120,000, and(v) Costs and interest of the suit.



4. It was her case that she was first employed by the Respondent in 2012 and worked continuously for 9 years until 20th March 2021, when she was verbally dismissed from her employment by the Respondent's Mr Mtabela. She was not informed of the reasons for the dismissal.
5. She asserted that the dismissal was unlawful and unfair, and as a result, she was entitled to the relief she sought in her pleadings.

#### **The Respondent's Case before the trial Court**

6. The Respondent and another witness testified in support of his case. The Respondent stated that he employed the Appellant temporarily as a housekeeper, and her duties included cleaning the house and caring for his granddaughter during the July and August holidays.
7. Initially, she paid a salary of Kshs 9,000 per month. After two years, he increased her pay to 10,000, through his Manager, Mr. Harun Mtelaba.
8. There was no active work at his residence due to her travel patterns. He was seldom in Mombasa. Consequently, in December 2020, he decided to transfer the Appellant to Kilima Gardens, where she would work under the direct supervision of Harun Mtelaba. Her duties at Kilima Gardens included cleaning the compound, staircases, and common areas.
9. After the transfer, she was not performing her duties diligently; she consistently reported to work late, could sleep during working hours, and often left before her shift was over. Due to her negligence in performing her duties, the tenants in the premises at Kilima Gardens threatened to vacate because the compound, staircase, and common areas had become dirty.

#### **The Appeal**

10. Aggrieved by the Judgment of the learned trial Magistrate, the Appellant impugns the decision, setting out seven [7] grounds he erred in law and fact;
  - I. In holding that the Appellant had not proved her case on a balance of probabilities
  - II. In holding that the Appellant was a piece rate worker when there was no pleading and evidence on the issue.
  - III. In finding and holding that the Appellant's service at Kilima Gardens was in respect of a different legal entity, when there was no evidence to that effect.
  - IV. In determining the case on issues that were not pleaded and/or raised in the submissions of the parties.
  - V. In holding that the Appellant was not entitled to the reliefs sought.
  - VI. In failing to interpret the provisions of the *Employment Act* on the procedural & substantive process of termination.
  - VII. In failing to consider the evidence on record to the effect that the Appellant was terminated without due process.

#### **The Appellant's Submissions**

11. The Appellant submitted that this Court, being a first Appellate Court, is bound to re-evaluate the material placed before the trial Court and come up with its own independent findings and conclusions.



To support this position, reliance was placed on the decision in the case of *Selle vs Associated Motor Boat Co.* [1968] EA 123.

12. It was argued that the learned trial Magistrate's finding that the Appellant was a piece-rate worker, and that at the material time she was an employee of a different entity and not that of the Respondent, was not based on the pleadings or evidence before him.
13. The finding was contrary to the undisputed fact that there existed an employer-employee relationship between the Respondent and the Appellant, and that the Appellant was transferred to Kilima Gardens as such employee. There was no evidence that Kilima Gardens was a legal entity, and it hadn't been pleaded so. The learned Magistrate's finding overlooked the importance and purpose of pleadings as set out in judicial precedents, among them *Dakianga Distributors (R) Ltd vs Kenya Seed Company Limited* [2015] KECA 14 [KLR].
14. The trial Magistrate erred in holding that the Appellant was not employed on a full-time basis, but instead on a piece-rate arrangement. The learned Magistrate also erred in concluding that the Appellant had taken up employment with Kilima Gardens, without such claim being supported by pleadings or evidence.
15. The Respondent, in his statement of defence, admitted that he employed the Appellant vide an oral agreement in 2012 as a house-help earning a basic salary of Kshs 10,000/=. This admission is sufficient to prove that this was not a piecework arrangement.
16. On the ground that the learned trial Magistrate failed to properly the statutory aspects of statutory and substantive justification in the context the matter that was before him, Counsel for the Appellant submitted, that the Respondent didn't discharge his legal burden before the trial Magistrate under the provisions of Action 43 of the *Employment Act* [proving the reason for the termination] and Section 45[ proving that the termination was procedurally fair]. He did not allow her the opportunity to be heard. He didn't show the reason for the termination.
17. It was argued that the law regarding termination due to desertion or absconding is well settled. Desertion of duty or absconding amounts to gross misconduct that can attract the sanction of dismissal. As termination of an employee's employment on account of gross misconduct has to be an act by the employer, then the employer must adhere to the provisions of section 41[2], must invite the employee to explain their absence before deciding to terminate. To buttress this point, reliance was placed on *James Okeyo V Maskant Flower Limited* [2015] eKLR.
18. The Respondent had an obligation, if it believed that the Appellant had absconded duty, to lawfully bring the contract of service to a close by invoking the provisions of section 44 of the *Employment Act*. The section permits an employer to terminate an employee who has absconded from duty, on the grounds of gross misconduct.
19. As the termination of the Appellant's employment was unfair, the learned trial Magistrate erred in law in not awarding the Appellant the reliefs sought.

### **The Respondent's Submissions**

20. Counsel for the Respondent identifies three issues for determination in this appeal: Whether the Appellant was terminated from her employment by the Respondent, whether the Appellant was entitled to the reliefs sought, and whether the trial court considered issues which were not pleaded.
21. On the first issue, Counsel submitted that Section 45 (2) of the *Employment Act* 2007 provides for when termination of an employee's employment can be deemed unfair, when the employer fails to



prove that the reason for the termination is valid and fair, and that the process leading to the decision was fair.

21. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in Section 47(5) of the *Employment Act*, which provides;

“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 or wrongful dismissal shall rest on the employer.”
22. It was further submitted that for termination of employment to be fair, there has to be a genuine reason for termination and adherence to procedural fairness. To fortify this submission, Counsel cited the case of *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR.
23. Contrary to the Appellant’s argument, the Respondent claimed she deserted duty. The position of the Respondent was that the Appellant’s employment terminated at her own initiative when she willingly left employment, stating that she had found employment somewhere else. This can be discerned from the evidence of the Respondent’s witness number two.
24. It is settled in law that he who alleges must prove; the Appellant did not discharge the burden of proof, to wit, that she was terminated from employment and that she did not willingly leave her employment.
25. In answer to the question, this Court should find that the Respondent did not terminate the Appellant’s employment, and she left employment voluntarily.
26. Having sufficiently established that the Appellant was in fact not terminated from her employment but that she chose to leave her employment of her own volition, the reliefs sought were properly not granted to her.
27. Sight should not be lost of the fact that during the last month of her service, she only worked for 20 days; nonetheless, she was given her full salary.
28. The Appellant’s contention that the learned trial Magistrate considered matters that were not pleaded and or supported by evidence is unfounded. All the issues that the learned trial Magistrate took into account formed part of the witness statements that the parties had filed and or oral testimony before the trial Court.
29. In its judgment, the trial Court rightly held that, although Kilima Gardens Limited was owned by the Respondent herein; the court took cognisance of the fact that, as a limited liability company, it has a distinct legal personality which is capable of suing and being sued.
30. In the event this court is persuaded to find that the trial court considered an unpleaded issue guided by the case of *Odd Jobs vs Mubea* [1970] EA 476, it should hold that a court may validly determine unpleaded issues where the evidence by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide.
31. Under the piecework arrangement, the Appellant was paid for her services. It is implausible for a person to claim they are employed when their duties include cleaning the house and performing other household chores. Yet, they do not have access, because the owner of the house is away on travel, and over the course of a year, he is away for about 7 or 8 months.



## Analysis and Determination

32. I have carefully considered the pleadings and evidence that were placed before the trial Court by the parties herein, the learned trial Magistrate's Judgment and the grounds of appeal, and hold that the appeal herein revolves around three main issues;
- I. Whether the Appellant was an employee of the Respondent at the material time.
  - II. If the answer to [I]above is in the affirmative, how did the separation between the Appellant and the Respondent occur?
  - III. Was there an unfair termination of the Appellant's employment?
33. The role of the first Appellate Court is now well-established. It re-evaluates the material presented before the trial Court and reaches its own independent findings and conclusions. The findings and conclusions of the trial Court are not binding on it. However, whenever it diverges from them, it must provide reasons for doing so.
34. The Appellant pleaded and maintained in her evidence that at all material times she was an employee of the Respondent. The learned trial Magistrate, in his Judgment, found that in the first phase of her employment, she was an employee of the Respondent; however, upon her transfer to Kilima Gardens, she became an employee of Kilima Gardens. This, and as shall come out shortly hereinafter, was a totally erroneous conclusion.
35. The finding by the learned trial Magistrate did not correspond with the pleadings and evidence presented by the parties. The significance and purpose of pleadings in civil suits cannot be underestimated. They are as crucial to the Court as they are to the litigants. Pleadings delineate the issues in dispute; they notify the parties of the adversary's case, serve as a roadmap for the Court, and define the scope of evidence, arguments, and final decision. See also *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014], eKLR.
36. In *Galaxy Paints Co. Ltd -v- Falcon Guards* [2000] eKLR, the Court of Appeal stated;
- “It is trite law, and the provisions of O.XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial Court, by dint of the provisions of O. XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for determination.”
37. Similarly, the Court of Appeal in the case of *DEN V PNN* [2015] eKLR, held as follows;
- “Generally, the law is that courts would determine a case on the issues that flow from pleadings, and judgment would be pronounced on the issues arising from the pleadings or from issues framed for the courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing.”
38. Although a party may call witnesses, evidence is not the same as pleadings. Pleadings form the basis on which evidence is presented. It is well-established law that evidence follows pleadings, and pleadings are binding not only on the parties but also on the court. [See *Independent Electoral and Boundaries Commission* [supra]].



39. I have carefully examined the Respondent’s pleadings and observe that at no point did he claim that the Appellant stopped being his employee when Kilima Gardens employed her. Critically analysing the pleadings and the witness statements from both the Respondent and his witness, the clear impression that emerges is that Kilima Gardens was a workplace to which the Appellant was transferred, and not an employer. The learned Magistrate had no basis to find that Kilima Gardens was a legal entity which later employed the Appellant and, as such, ought to have been sued as a legal person.
40. Equally, his conclusion that the Appellant worked for the Respondent on a piecework arrangement was a finding that was in apparent deviance of the Respondent’s averments in the Statement of Response and his witness statement that the Appellant was a term employee who was paid at the end of every month. The witness statement of the Respondent’s witness fortifies this position.
41. In the upshot, I find that at all material times, the Appellant was an employee of the Respondent under an indefinite employment arrangement.
42. The parties took diametrically opposite positions as regards how the Appellant and the Respondent separated. The Appellant asserted that she was verbally dismissed from her employment by the Respondent’s Manager, Harun. On the other hand, the Respondent contended that the Appellant verbally resigned. I note the trial learned Magistrate didn’t, in his judgment, deal with and determine this vital issue elaborately and conclusively.
43. While having it in mind that I didn’t hear or see the parties and the witness testifying, I have to pronounce myself on the issue, as it will inform the outcome of the two remaining issues identified for determination. I have carefully considered the pleadings by the Appellant, her witness statement [turned evidence in chief], and evidence under cross-examination, embodied in the record of appeal, and conclude that she maintained consistency on pivotal issues of the matter in controversy before the trial court, throughout.
44. Unlike the Appellant, the Respondent and his witness’s evidence at the hearing, in my view, substantially contradicted his pleadings and witness statements [turned their evidence in chief]. I see it in no other way than that the departure from the pleadings and initial statements was an afterthought—a deliberate attempt to avoid liability on the part of the Respondent. For instance, how can it be explained that an employer who, in the pleadings and initial statement, appears to admit that at all material times the Appellant was his employee, changes tone without amending the pleadings, and contends at the trial that, after some time, the Appellant was another person’s employee.
45. The effect of the foregoing is the conclusion that the Appellant’s evidence regarding how the separation occurred is more credible than the Respondent’s and his witness’s. As such, I hold that the Appellant was verbally and summarily dismissed from her employment by the Respondent. 47. Section 43 of the [Employment Act](#) imposes a legal obligation on the employer in a dispute regarding the termination of an employee’s employment to prove the reason for the termination; failure to do so shall render the termination unfair as per section 45 of the [Employment Act](#).
46. Important to note that it isn’t enough for the employer to discharge the burden under section 43. The Act imposes a further legal burden on them under section 45 to demonstrate that the reason[s] were valid and fair.
47. I have carefully scrutinised the evidence that the Respondent placed before the trial Court, and conclude that it wasn’t in any way aimed at aiding him in discharging the twin legal burden. I think his witness and he were blurred by the position they took concerning how the separation occurred.
48. Having said this, the dismissal of the Appellant from her employment was unfair.



49. The essence of the foregoing is that the learned trial Magistrate erred in both law and fact by concluding that the Appellant was not at all times an employee of the Respondent and that she was not unfairly dismissed from her employment.
50. I now consider whether the Appellant was entitled to the reliefs sought. It is clear from the learned trial Magistrate's Judgment that he failed to appreciate that the Appellant had sought in his pleadings reliefs of two categories. Those that could, if proved, be granted independently of the claim for unfair termination or dismissal and those that were dependent on the claim.
51. Section 49[1][c] of the *Employment Act*, 2007, bestows upon courts the authority to grant compensatory relief in favour of an employee who has successfully challenged their employer's decision to terminate their employment or summarily dismiss them from employment. The authority is discretionary. The award is made on a case-by-case basis. Having found that the dismissal of the Appellant was unfair, and noting that the learned trial Magistrate didn't make any award having found that there was no unfair termination, I have carefully considered the circumstances of the dismissal, the length of the Appellant's service and that she did not contribute to the separation in any proven way, and find that she is entitled to the relief. I hereby grant her five months' gross salary.
52. The Appellant's employment was terminable by twenty-eight days' notice. Undeniably, the notice wasn't issued. She is entitled to the same under section 36 of the *Employment Act*. She is hereby granted one month's salary in lieu of notice.
53. The Appellant sought "Unpaid leave days for 9 years [385 x 9 years x 21 days, Kshs. 72,000." In the pleadings filed by the Appellant in the lower court, no factual basis is established for this relief. The witness statement [turned evidence in chief] and her oral testimony before the trial court do not provide any basis for the relief either. The relief cannot be granted, therefore.
54. In the upshot, the Appellant's appeal succeeds. The learned trial Magistrate's Judgment is hereby set aside, and in place thereof this Court's Judgment is entered for the Appellant, thus;
- a. A declaration that the termination of the Appellant's employment was at the initiative of the Respondent, and it was unfair.
  - b. Compensation for unfair dismissal, five months' gross salary, Kshs. 50,000.
  - c. One month's salary in lieu of notice, Kshs. 10,000.
  - d. Interest on the awarded sum, from the date of the lower court's Judgment till full payment.
  - e. Costs of the suit.

**READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2025.**

**SIGNED**

**JUSTICE OCHARO KEBIRA**

