



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Waita v Imara Steel Mills Ltd (Appeal E066 of 2022)
[2025] KEELRC 2456 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E066 OF 2022
NJ ABUODHA, J
SEPTEMBER 17, 2025**

BETWEEN

BENARD MUTUA WAITA APPELLANT

AND

IMARA STEEL MILLS LTD RESPONDENT

*(Being an appeal from the Judgment and decree of Chief Magistrate's Court, Kajiado
Hon. L.L Gicheha, CM delivered on 12th May, 2022 in CMEL NO. 11 of 2020)*

JUDGMENT

1. Through the Memorandum of Appeal dated 7th July, 2023 the Appellant appeals against the judgement of Hon. L.L Gicheha, CM delivered on 12th May, 2022 in CMEL NO. 11 of 2020. The Appeal was based on the grounds among others that:
 - a. That the learned trial Magistrate erred in law and in fact in holding that the Appellant was a casual employee.
 - b. That the learned trial Magistrate erred in law and in fact in finding that the Appellant had resigned voluntarily.
 - c. That the learned trial Magistrate erred in law and in fact in holding that the Appellant had not testified in regard to the alleged resignation.
 - d. That the learned trial magistrate erred in law and in fact in holding that the Appellant had been paid his terminal dues
2. The appellant therefore prayed that the entire judgment and decree of the Chief Magistrate's Court at Kajiado written and delivered by Hon. L.L Gicheha, CM delivered on 12th May, 2022 in CMEL NO. 11; Benard Mutua Waita vs. Imara Steel Mills Limited against the appellant be discharged and set



aside and the Honourable Court makes an appropriate judgment on unfair and unlawful termination, reliefs as pleaded and determines the said suit finally.

3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's Advocate Mr. Ngige submitted among others that the appellant disputed the learned trial magistrate's finding that he had voluntarily resigned from employment and that he was paid his dues. According to counsel, the appellant denied ever resigning and disowned the alleged resignation letter. He disowned the signature on the letter and denied being at the respondent's premises on the alleged date. The appellant having disowned the letter and in absence of a report from a document examiner confirming that the handwriting was the claimant's, the said letter lacked any weight and was simply a forgery intended to defeat the appellant's case. In this respect counsel relied on the case of *Mutungu Nyamai vs. Chancery Restaurant Limited t/a China Plate* [2020] eKLR.
5. Mr. Ngige further submitted that even if it were true that the appellant resigned, which he did not, the circumstances surrounding the resignation would not be voluntary and would amount to constructive dismissal. In this regard Counsel relied on the case of *Rose Mwikali Nzuki v Food for the Hungry Kenya* [2015] eKLR. According to counsel, the respondent more than likely induced or tricked the respondent to write a resignation letter on the promise that his terminal dues would be paid. The resignation would therefore entitle the respondent not to follow procedural fairness which was an abuse of the law and the court process. The learned magistrate therefore erred in finding that the appellant had resigned voluntarily.
6. On the reliefs sought, counsel submitted that the trial magistrate failed to address the issue of reliefs sought after dismissing the appellant's claim with costs. The learned trial magistrate failed to appreciate that the reliefs were independent of whether the appellant was dismissed fairly or not. Mr. Ngige therefore called upon the court to correct the error and award the appellant dues owed to him as pleaded.

Respondent's Submission.

7. Mr. Maina, Counsel for the respondent on the other hand submitted that his client paid to the appellant all his dues owed up until that point before employing him on contractual basis, renewable every six months until his retirement. This according to Counsel was permissible under section 9 of the *Employment Act* and the learned trial magistrate agreed with the respondent in this respect in her judgment. Counsel therefore submitted that the appellant's contract could only be terminated as per the terms of the contract and payment of terminal dues by the respondent. Mr. Ngige further submitted that the burden of proof that he did not receive his terminal dues upon resignation was on the appellant. In this regard counsel invoked section 107 of the *Evidence Act* and cited the cases of *Ahmed Mohammed Noor v. Abdi Aziz Osman* [2019]eKLR, *Levi Simiyu Makali vs. Koyi John Waluke & 2 Others* [2018] eKLR and *Raila Amolo Odinga & Another vs. IEBC & 2 Others*.
8. Counsel submitted that the appellant alleges that he was not paid his terminal dues and is owed the sums claimed. He also claimed he was constructively dismissed from employment however during the trial and as evidenced by the respondent's documents, it was shown that the appellant not only resigned voluntarily but also signed a termination agreement over two months after his resignation stating he received all his terminal dues. This evidence was not controverted before the trial court.



Determination

9. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by both counsel herein and reiterate that the principles which guide this court in an appeal from a trial court are now well settled. In *Gitobu Manyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 this respect.

10. The trial Court (Hon. L.L Gicheha), had the benefit of listening to evidence and observing the demeanour of witnesses and came to the decision, the subject of the present appeal. The Court acknowledges that an appeal to this court from a trial by the magistrate's court is by way of retrial. However in exercising this jurisdiction, the court must guard against acting whimsically and replacing its view of the judgment it could have reached if it tried the matter in the first instance with the finding of the trial court. The decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it is clothed with jurisdiction to reevaluate the evidence and come up with its own findings.
11. The Court has reviewed and considered the judgment of the trial court vis-à-vis the evidence presented and is persuaded that the judgment delivered was a reasonable deduction from the evidence presented. For example in the judgment found at page 93 of the record of appeal and more particularly at page 5 of the actual judgment, the learned magistrate observes as follows:

“The issue is whether the claimant was constructively dismissed. In his evidence he only states that he reported back after the injury and his services were terminated, I have looked at his statement or evidence in court and he did not testify on the circumstances leading to his resignation. He resigned and received his terminal dues. There was no allegation that the signature on the discharge voucher is not his nor is there evidence he was coerced to resign.”

12. The learned trial magistrate thereafter proceeded to cite sections 107, 108 and 109 of the *evidence Act* which deals with the burden of proof and incidence thereof and when it shifts. The basic principle on the legal burden of proof is that it is on the person who alleges something. Once he discharges this burden, the evidentiary burden shifts to the person accused to show that they complied with the law. That is to say evidentiary burden of proof rests upon the defendant on a matter already proved by the plaintiff to show otherwise. The legal burden of proof however remains throughout on the plaintiff to prove his case to the laid down standard of proof. The Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR stated that:-

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidentiary burden is a shifting one, and is a requisite response to an already-discharged initial burden. “The evidentiary burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or



non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”

13. The trial court was not persuaded that the appellant discharged the burden of proof cast upon him by law to show that he was constructively dismissed by the respondent. Besides it is not permissible for the appellant to breath hot and cold at the same time. He cannot on the one hand deny he penned the resignation letter yet on the same breath claim he was coerced to sign the same hence involuntary and amounted to constructive dismissal.
14. The Court is therefore not persuaded that the appellant has presented sufficient grounds to warrant disturbing the finding of the trial court which in the court’s view was based on the preponderance of the evidence presented before it.
15. The appeal is therefore found without merit and is hereby dismissed with costs.
16. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2025

DELIVERED VIRTUALLY THIS 17TH DAY OF SEPTEMBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

