



**Superfit Steelcon Limited v Alingo (Appeal 15 of 2023)  
[2024] KEELRC 1766 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1766 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 15 OF 2023**

**JK GAKERI, J**

**JULY 8, 2024**

**BETWEEN**

**SUPERFIT STEELCON LIMITED ..... APPELLANT**

**AND**

**TONNY MWALE ALINGO ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, Superfit Steelcon Ltd has brought this appeal being aggrieved by the decision of the Chief Magistrates Court (Hon. L.B. Koech) dated 25<sup>th</sup> August, 2022 which granted the Claimant pay in lieu of notice, unpaid salary for 11 days, unpaid service pay, unremitted NSSF deductions and compensation.
2. Briefly, the facts are that on 1<sup>st</sup> August, 2008, the Respondent employed the Claimant as a Welder at Kshs.16,000/= and in 2006, he was promoted to an erector at a consolidated salary of Kshs.27,006/= per month. The Claimant signed the contract on 14<sup>th</sup> December, 2016 and was posted at Sarit Centre in July 2020 at the site of Laxman Bhai. That fire from an adjacent site consumed a section of the structure they had constructed, repairs were effected and the damaged iron sheets were placed at a particular site manned by the contractor to await inspection by the Insurer but the sheets were stolen between Saturday 11<sup>th</sup> July, 2020 and Monday 13<sup>th</sup> July, 2020 and the Respondent was implicated in the theft and taken to the police station and released on the following day.
3. That when he reported to the site on 14<sup>th</sup> July, 2020, the supervisor told him not to go back to work anymore.
4. According to the Respondent, the Claimant disappeared as soon as he was released by the police and thus absconded duty.
5. That the Respondent learnt of the theft of iron sheets on 13<sup>th</sup> July, 2020 and the suspects were the Claimant and two of his colleagues but the Claimant was released and not charged.



6. It was the Respondent's case that since the Claimant absconded duty, it could not take him through any disciplinary process. RWI, Mr. Bernard Mmbayi admitted on cross-examination that he did not call the Claimant to resume duty.
7. After weighing the evidence adduced before it, the trial court found that the termination of the Claimant's employment was unfair as the alleged CCTV footage which captured the theft was not availed by the Respondent.
8. The court awarded the sum of Kshs.167,564.00 comprising one month's salary in lieu of notice, unpaid salary for July 2020 (11 days), unpaid service pay and unremitted NSSF deductions as well as costs and interest at court rates.
9. This is the decision that is the subject of this appeal, which is predicated on the grounds that;
  1. The trial court erred in law and fact by disregarding clear and credible evidence on record that;
    - a. The Respondent actually stole cladding iron sheets from a construction site where he had been assigned to supervise certain work on behalf of the Appellant.
    - b. The Respondent thereafter absconded from duty since 14<sup>th</sup> July, 2020 hence effectively terminated his contract of employment with the Appellant.
    - c. The Respondent absconded from duty, avoided any disciplinary action that would have been procedurally undertaken by the Appellant against him.
    - d. The Appellant was thus not to blame for the termination of the contract of employment in the circumstances.
  2. The trial court erred in law and fact in failing to appreciate that this was a case of theft, gross misconduct and absconding duty on the part of the Respondent who should not unjustly enrich himself for his own wrong-doing.
  3. The trial court erred in law and fact in finding that the Respondent was entitled to compensation for unfair and unlawful compensation, unpaid service charge, unpaid service and unremitted NSSF deductions when there was clear evidence proving the contrary.
  4. The Judgment/Decree is wholly unsupported by the evidence on record.
10. The Appellant prays that the appeal be allowed and the judgment and decree of the trial Magistrate set aside or substituted with an order dismissing the Respondent's suit with costs to the Appellant.
11. Counsel for the Appellant urges that the Respondent was a registered member of the NSSF and thus not entitled to service pay under Section 35(6)(d) of the [Employment Act](#), 2007, to submit that the trial court acted against express provisions of the law.
12. According to counsel, the Respondent was pardoned. That according to RWI and RWII after the Respondent was released by the police, he was unavailable for disciplinary action and the pardon by the construction company was an act of kindness, mercy or charity.
13. Counsel urged that the correspondences on record have not been contradicted and the issue of unlawful termination does not arise in the circumstances as the Respondent deserted duty.
14. Counsel submits that the typed proceedings are mixed up, muddled up and sketchy as inter alia at page 132, it is unclear who is being cross-examined and Alfonse Kyalo, RWI is indicated as CW2 as the



- trial court treated his evidence as the Respondent's which led to confusion in the judgment. That the evidence was in support of the Appellant's case.
15. In sum, counsel submits that based on the evidence on record, the Respondent absconded duty or deserted the workplace and no service pay was awardable as the Respondent was a member of the NSSF.
  16. Reliance was made on the sentiments of the Court of Appeal in *Selle & another v Associated Motor Boat Ltd & others* (1968) EA 123 to urge the court to reconsider the pleadings, evidence and submissions before the trial court.
  17. On his part, counsel for the Respondent submitted that on the alleged theft of cladding iron sheets, the Appellant had not furnished evidence as required by the provisions of Section 107 of the *Evidence Act* as exemplified by *Charles Kariuki J. in Stanley Maira Kaguongo v Isaac Kibiru Kabuthia* (2022) eKLR, as the Respondent did not confess or admit the theft.
  18. Counsel further submits that the Appellant had not shown that it terminated the Respondent's employment procedurally.
  19. As to whether the learned trial Magistrate's judgement should prevail, counsel for the Respondent urges that the judgment is a succinct summary of the case and the court took proper consideration of the evidence and submissions and the mix up was inconsequential as the Appellant's evidence was not confused as that of the Respondent.
  20. On entitlement to the service pay, counsel submits that membership of the NSSF does not bar an employee from service pay as held in *Elijah Kipkoros Tonui v Ngari Opticians T/A Bright Eyes Ltd* (2014) eKLR.
  21. Counsel submits that the Respondent was employed in 2008 as evidenced by the NSSF statement on record.
  22. According to counsel, the learned trial Magistrate was correct in awarding service pay and NSSF deductions.

### **Analysis and determination**

23. The Appellant's counsel faults the trial Magistrate on the basis of findings that there was an unfair termination yet the Respondent deserted the workplace.
24. The trial court is also faulted on the reliefs awarded.
25. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence on record as guided in legions of decisions such as *Selle v Associated Motor Boat Co. Ltd & others (Supra)*, where the Court of Appeal stated;  

“ . . . An appeal to this court . . . is by way of a 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 witness and should make due allowance in this respect . . . ”
26. Before delving into the attendant issues, it is essential to dispose of the issue whether the typed proceedings are sketchy, muddle and mixed up as alleged by the Appellant's counsel which the Respondent agrees with but argues that the trial court was guided by the evidence before it and arrived at a correct decision.



27. It is true that the evidence of Alphonse Kyalo, RWI was captured as that of CWI yet the Respondent's case had only one witness which created the impression that the Appellant had only one witness while it had two (2). Other than that misstatement, the trial Magistrate captured the evidence as it was presented to the court.
28. The Appellant tendered no proof of the evidence the trial court did not record to make the proceedings sketchy.
29. Finally, in its judgment, the trial court was clear in its mind that the Appellant availed (two) 2 witnesses and the Respondent had one.
30. In the court's view, the misstatement of the appellant's witness as that of the Respondent had no effect on the decision made by the court.
31. It is common ground that at the material time, the Respondent was based at the Sarit Centre Westlands, at the construction site of Laxman Bhai Construction Co. Ltd.
32. It is also not in contest that some burnt cladding iron sheets which the Respondent had handled were stolen between 11<sup>th</sup> and 13<sup>th</sup> July, 2020 and the Respondent was one of the suspects and was arrested and taken to the Parklands Police Station on 13<sup>th</sup> July, 2020 and released on the following day and no charges were preferred against him. He did not record a statement.
33. The Respondent admitted on cross-examination that the site had guards and CCTV cameras.
34. A letter by the construction company to the Appellant dated 18<sup>th</sup> July, 2020 informs the Appellant that the Respondent and his colleagues could clearly be seen on the CCTV footage.
35. The letter requests the Appellant to take appropriate action against the suspects to avoid such occurrences in future.
36. This is the most likely part of the correspondence the Appellant's counsel is relying upon to urge that the trial Magistrate ought to have found that the Respondent stole the cladding iron sheets.
37. The Respondent testified that he did not know who stole the cladding iron sheets, did not record a statement and was not charged.
38. DWI was also arrested but not charged. He denied having stolen the sheets or confessing. That Mr. Alphonse told him not to go to work.
39. DWII confirmed that none of the employees was charged for the theft or record a statement with the police and none of them confessed.
40. That he did not inform the Respondent not to report to work.
41. Although the witness testified that the Respondent was seen stealing the cladding sheets, he did not testify that he saw the CCTV footage and it was not availed to the court.
42. The letter dated 18<sup>th</sup> July, 2020 lacks probative value as neither author nor a witness who had viewed the CCTV footage testified about it and availed the same.
43. Based on the evidence before the court, the trial Magistrate could not sustainably find or hold that the Appellant had proved on a balance of probabilities that the Respondent stole the cladding sheets.
44. The trial court cannot be faulted for not having found the allegation of theft as proved.



45. Concerning termination of employment, while the Respondent alleged that he was told not to report to the workplace after he was released on 14<sup>th</sup> July, 2020, the Appellant argued that the Respondent's employment was not terminated but he deserted or absconded duty and arguably ended the employment relationship unilaterally.
46. According to *Black's Law Dictionary* (10<sup>th</sup> Edition) desertion is defined as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
47. Desertion is grounded on the employee's intention not to return to the workplace and constitutes a serious administrative infraction if proved against an employee. (See *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA).
48. It is trite law that an employer who pleads or alleges that the employee deserted the workplace is required to demonstrate the efforts made to reach out to the employee to resume duty.
49. The foregoing is fortified by the sentiments of Maureen Onyango J. in *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR as follows;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
50. (See also *Julius Kyalo Malonza v Ruth Osoto t/a Eraeva Catering Services* (2021) eKLR, *Boniface Francis Mwangi v B.O.M Iyego Secondary School* (2019) eKLR, *Simon Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR, *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR and among others).
51. In the instant case, the Appellant adduced no evidence of having made any attempt to contact the Respondent or make him aware that termination of his employment on the ground of desertion was under consideration.
52. Indeed, RWII confirmed on cross-examination that he did not call the Respondent to resume duty.
53. From the foregoing, it is discernible that the Appellant failed to prove that the Respondent absconded duty or deserted the workplace.
54. Relatedly, and contrary to the Appellant counsel's submission that the Respondent avoided being taken through a disciplinary process, the law places the burden on the employer to demonstrate that it notified the employee of the impending disciplinary action.
55. The foregoing is fortified by the sentiments of the court in *Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR as follows;
- “Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this court that it accorded the Claimant a fair hearing prior to her termination.”
56. Having failed to prove that the Respondent absconded or deserted, the Appellant cannot argue that he avoided disciplinary action.



57. A notice to show cause sent to the Respondent's last known address followed by a letter of termination would have shown that the Respondent disappeared from the workplace with no intention of returning.
58. The inescapable finding is that termination of the Respondent's employment was unfair.
59. Regrettably, the learned trial Magistrate did not address the issue whether the Respondent absconded duty or deserted his post.
60. The foregoing disposes of grounds one, two and four of the Memorandum of Appeal.
61. The trial court's judgment is also faulted on the finding that the Respondent was entitled to compensation, service pay and unremitted NSSF deductions.
62. On termination of the Respondent's employment, the trial court found that the Appellant did not furnish sufficient evidence to prove that the Respondent stole the cladding sheets or was taken through a fair procedure as by law required.
63. The court found that the termination was unfair and this court made a similar finding elsewhere in this judgment.
64. As regards service pay, evidence availed to the trial court shows that the Respondent was a member of the NSSF and contributions were being made by the Appellant and RWI confirmed as much. This is also confirmed by copies of payslips provided by the Respondent.
65. Section 35(6)(d) of the [Employment Act](#), 2007 disentitles service pay to an employee who is a member of the National Social Security Fund (NSSF) which is administered by the National Social Security Fund Board under the provisions of the [National Social Security Fund Act](#).
66. The trial court stated as follows;

“The Claimant having worked for the Respondent for more than 5 years is entitled to service pay. I therefore award him Kshs.69,944/= . . .”
67. It is unclear to the court what the trial court considered in arriving at the foregoing finding as no analysis preceded the finding. This is informed by the fact that whether or not service pay is awardable is dependent on the employee's membership to any of the schemes or pension funds identified under Section 35(6) of the [Employment Act](#), 2007. The Act prescribes no other parameters not even remission of deductions to the Fund.
68. Under the Act, the fact of membership determinative.
69. In the court's view, the award of Kshs.69,944/= lack's justification.
70. Although the decision cited by the Respondent's counsel in [Elijah Kipkoros Tonui v Ngari Options T/A Bright Eyes Ltd](#) (*Supra*) is persuasive, in the instant case, it was not demonstrated that the Respondent was not remitting NSSF deductions for 5 years or any other period.
71. More significantly, however, the Provisional NSSF statement on record reveals that the Respondent's NSSF deductions were remitted from 2008 to September 2009 save for a total of 19 months amounting to Kshs.3,800/= and January to July 2020, amounting to Kshs.1,400/= which the Respondent is entitled to Kshs.5,200/= as unremitted NSSF deductions.
72. The foregoing also addresses the issue of unremitted NSSF deductions.



73. Finally, as regards compensation, the court is persuaded that the trial court exercised its discretion judiciously in awarding the 2 months gross salary as compensation.
74. As to whether the court should interfere with the exercise of discretion by the trial court, the court is guided by the sentiments of the Court of Appeal in the often cited decision *Mbogo v Shah & another* (1968) EA as follows;
- “An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”
75. Madan JA (as he then was) expressed similar sentiments in *United India Insurance Co. Ltd V East Africa Underwriters (K) Ltd* (1985) EA as follows;
- “The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account considerations of which he should not have taken account or fifthly, that his decision, albeit discretionary one, is plainly wrong.”
76. The court is properly guided by these binding sentiments.
77. In the instant appeal, it is evident that the trial court awarded service pay on the ground that the Respondent had worked for the Appellant for more than 5 years which is not one of the considerations to be taken into account in determining whether or not service pay is awardable.
78. This court has a justification to interfere with the award made by the trial court as the same was merited since the Respondent was a member of the NSSF and had additionally made a claim for unremitted dues which was clear evidence that the employer was remitting deductions but had not done so for identifiable number of months.
79. Consequently, the sum of Kshs.69,944/= awarded as service pay is set aside.
80. From the NSSF Provisional Statement on record, it is clear that the Appellant had deducted but not remitted the Respondent’s NSSF dues for a duration of 26 months from August 2008 to July 2020, Kshs.5,200/= which the Claimant is awarded.
81. Consequently, the sum of Kshs.5,600/= awarded by the trial court is adjusted to Kshs.5,200/=.
82. In conclusion, the award by the trial court is modified as follows;
- a. Declaration that termination of the Respondent’s employment by the Appellant was unfair and unlawful.
  - b. Unremitted NSSF deductions Kshs.5,200.00.
  - c. Unpaid service pay Kshs.69,944.00 is set aside.
  - d. All other awards by the trial court are affirmed.
83. Parties shall bear their own costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

