



Newmatic Kitchen Kenya Limited v Musyimi (Employment and Labour Relations Appeal E206 of 2024) [2025] KEELRC 2626 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2626 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E206 OF 2024
NJ ABUODHA, J
SEPTEMBER 26, 2025**

BETWEEN

NEWMATIC KITCHEN KENYA LIMITED APPELLANT

AND

SUSAN MWENDE MUSYIMI RESPONDENT

(Being an appeal from the Judgment & Decree made by Hon. Lucy Ambasi (CM) on 28th June, 2024 in Milimani MCELRC No. E1506 of 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 26th July 2024, the Appellant appeals against the whole of the Judgment of Honourable Lucy Ambasi, CM.
2. The Appeal was based on the grounds that:
 - i. The Learned trial Magistrate erred in law and fact in finding that the Respondent's termination was procedurally and substantively unfair and unjustified.
 - ii. The Learned trial Magistrate erred in law and fact in disregarding and/or failing to consider the evidence before her in totality hence arrived at an erroneous determination.
 - iii. The Learned trial Magistrate erred in law and in fact in her finding that there was no evidence adduced in support of the Appellant's counter-claim.
 - iv. The Learned trial Magistrate erred in law and fact in failing to consider the written submissions by the Appellant on both the law and facts and



the binding authorities therein hence arrived at an erroneous and unjust determination.

3. The Appellant prayed that the Learned Magistrate's Judgment and Decree be set aside and be substituted with an order dismissing the Respondent's claim and allowing the Appellant's counter-claim with costs.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Mbugua Ng'ang'a & Co. Advocates filed written submissions dated 11th April 2025.
6. On the issue whether the learned magistrate erred by finding that the Respondent's termination was both procedurally and substantively unfair and unjustified, counsel submitted that the circumstances leading up to the Respondent's loss of employment did not constitute a termination let alone an unlawful termination.
7. Counsel submitted that the Respondent despite considerable effort to annex purported letters of employment, promotion and M-pesa statements to show proof of employment, the Respondent did not provide any document or evidence to support her allegations of unlawful termination. That she never gave any reasons behind her termination or how the decision was communicated to her.
8. Counsel relied on Section 107(1) and section 109 of the *Evidence Act* on the principle of proof of the said allegations on he who alleges must prove. Counsel further relied, among other cases, on the Court of Appeal case of Ondieki v Comply Industries Ltd [2023] KECA 1146 (KLR) on this burden of proof by the party who alleges.
9. Counsel submitted that the Learned Magistrate totally disregarded the Appellant's contention that the Respondent had not discharged her duty of proving termination and/or irregularity of the process. That the court ought to have ascertained this burden by the Respondent before shifting the burden to the Appellant to justify the lawfulness of the alleged termination. Counsel relied on sections 43,45 and 47 of the *Employment Act* and the case of Mnyika v Vambeco Enterprises Limited (2022) KEELRC 1709(KLR) in support of the contention.
10. On the issue whether the Learned Magistrate erred by failing to consider the evidence adduced in its totality and in finding that there was no evidence to support the Appellant's Counterclaim, counsel submitted that the Appellant adduced various documents in support of its case against the Respondent which included copies of the OB and statements recorded at Kabete Police Station.
11. Counsel further submitted that the evidence adduced was to demonstrate that one of the Appellant's directors had reported the Respondent for theft of funds and that the Respondent had admitted to the same whereupon the Respondent agreed to refund to the funds to the Appellant.
12. Counsel submitted that it was on basis of the admission that the Appellant agreed to the option of resolving the matter out of court choosing not to pursue criminal proceedings against the Respondent on the understanding that she would repay the stolen money. The trial magistrate never considered the statement recorded at police station where the Respondent admitted to having stolen Kshs 10,000/= and USD 500 from the Appellant.



13. Counsel submitted that it is trite law that a court is duty bound to consider all evidence in totality as asserted by the Court of Appeal in *Sicpa SA v Public Procurement Administrative Review Board & 2 others* [2024] KECA 939 (KLR).
14. Counsel submitted that it was a mis-direction on the part of the trial Court to completely disregard the Appellant's evidence and submissions in support of its case and counterclaim. The Respondent left the employment willingly in an attempt to renege on her commitment to repay the stolen funds. In any case her actions could have led to summary dismissal.

Respondent's Submissions

15. The Respondent's Advocates G.M Orina & Co. Advocates filed written submissions dated 9th May 2025.
16. On the issue whether the Honourable trial magistrate erred in finding that the Respondent's termination was unfair and unlawful, counsel relied on section 41 of the *Employment Act* to submit that the Respondent's termination was unfair as she was neither given notice nor afforded the opportunity to be heard. That the said section laid down the procedure for dismissing an employee on gross misconduct and which was summarized in the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited* (2013) eKLR.
17. Counsel submitted that the actions of the Respondent amounted to termination which did not meet the threshold articulated in law in terms of procedural fairness as the appellant did not invite the Respondent, either on her own or with her representative for a hearing and did not explain to the Respondent the reasons for her termination.
18. Counsel relied on among others the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR on section 41 of the Act on procedural fairness being drafted on mandatory terms. Counsel relied further on section 43(1) of the *Employment Act* on proof of reasons for termination by employer which if not proved amounted to unfair termination under section 45 of the Act.
19. On the issue whether the Honourable trial magistrate erred in finding that the Appellant's evidence in support of their counterclaim did not have any probative value, counsel submitted that no police officer was called at trial to testify whether the Respondent stole monies from the Appellant and that on cross examination, the Appellant's witness confirmed there was no agreement adduced as evidence to confirm that parties had agreed on a refund. That the Respondent agreed to refund the money in order to be allowed to report to work only for her to return to work and be verbally notified that she was fired.
20. Counsel submitted that the Respondent was never charged in a court of law with the offence of stealing by servant and that there was no ruling or judgment by a court of competent jurisdiction holding her guilty.
21. Counsel submitted that the Appellant was trying to hoodwink the Honourable Court into thinking that the Respondent was a bad employee while they flouted all laid down procedures for terminating an employee from employment.

Determination

22. The court has considered the pleadings and submissions filed by the both parties herein and as a guidance in determining the appeal relies the often stated principles which guide the court in an appeal



from a trial which have been stated in several cases including the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where it was stated:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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”

23. In this case the trial court entered judgment in favour of the Respondent against the Appellant finding that the termination was unfair and awarded notice pay of Kshs 20,000/=, 12 months compensation of Kshs 240,000/=, House Allowance of Kshs. 18,000/= and certificate of service together with costs and interest.
24. The Appellant appeals on the whole of the Judgment and although the reliefs awarded to the Respondent are not challenged the Appellant challenges the finding of the unfair termination. The court will therefore stick the grounds of the appeal and not venture on the reliefs awarded by the trial court. The court finds that the issues placed by the parties for determination in the appeal are:
 - i. Whether the trial court erred in finding that Respondent’s termination of employment was unfair and unlawful
 - ii. Whether the trial learned Magistrate erred in disallowing the Appellant’s counterclaim.

Whether the trial court erred by finding that Respondent’s termination of employment was unfair and unlawful

25. It was not in dispute that the Respondent was an employee of the Appellant from April 2016 as a domestic worker who was promoted to senior housekeeper with her last salary being Kshs. 20,000/= in May 2022.
26. The Respondent claimed that she was summarily dismissed verbally without notice and reasons for her termination. The Appellant on the other hand alleged that the Respondent left work willingly to avoid repaying the money she agreed to repay after she admitted stealing the same from the appellant. The court notes that the Appellant produced OB and statements from Kabete police station in support of the theft claims. The Appellant also alleged that they agreed to settle the matter out of court and they did not pursue the matter in court. The trial court found the termination to be unfair since no agreement on settlement was produced before the court and the Respondent denied recording the statements at the police station.
27. The ELRC has always held that for termination to pass fairness test there should be both substantive and procedural fairness. For example in this respect the court refers to the holding in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation (2021) eKLR among others.
28. The court is of the view that in as much as the Respondent had a duty under section 47(5) of the *Employment Act* to prove that termination occurred the trial court was right to find that the Respondent illustrated that the termination had occurred and the burden shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provision.
29. The requirement for a fair and valid reason is governed under section 43 of the *Employment Act* where the termination will be unfair under section 45 if the reasons are not proved.



30. The court notes that the Respondent alleged that they agreed to repay the money in order to be allowed to continue working only to be verbally terminated upon resuming work. Under Section 44(4) (g) of the *Employment Act*, summary dismissal is justifiable on grounds of gross misconduct especially in a case where one is charged with a criminal offence with regard to loss of property belonging to the employer.
31. In the present case although the Appellant might have had suspicion on the Respondent of theft the same had to be specifically proved. The courts have emphasized in among other cases, the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR that-
- Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.
32. The reason given by the Appellant was that the Respondent left work to avoid repaying the agreed amount. This court does not find it true that after the six years the Respondent served the Appellant she could just leave work to avoid repaying the lost amounts unless she was terminated further, there was no evidence of a show cause letter or any form communication to the Respondent over absconding duties after she failed to show up for work. To this court therefore, the Respondent discharged her burden of proof that she was unfairly terminated but the Appellant did not justify the reasons for the termination. Further the appellant never provided any evidence that any form of communication was made to the respondent to show cause why her employment should not be terminated after she absconded duties.

Whether the trial learned Magistrate erred in disallowing the Appellant’s counterclaim

33. The Appellant faults the trial court for disallowing its counterclaim. The counterclaim seeks to recover the alleged lost amounts from the Respondent. The court agrees with the trial court to the extent that the Appellant did not produce tangible evidence of the CCTV footage alleged, to illustrate that the Respondent stole the funds. Apart from the Police station statements and OB nothing more was produced to show that the Respondent agreed to pay the said amounts.
34. In addition, the Respondent alleged that she only agreed to repay the amount to be allowed to continue working. There is no written agreement or proposal before the court to show that the Respondent was bound to pay the said lost funds.
35. In the upshot the Appeal is found unmerited and is hereby dismissed with costs to the Respondent.
36. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025

DELIVERED VIRTUALLY THIS 26TH DAY OF SEPTEMBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

