

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E195 OF 2024

ABRAHA T KAHASU.....

APPELLANT

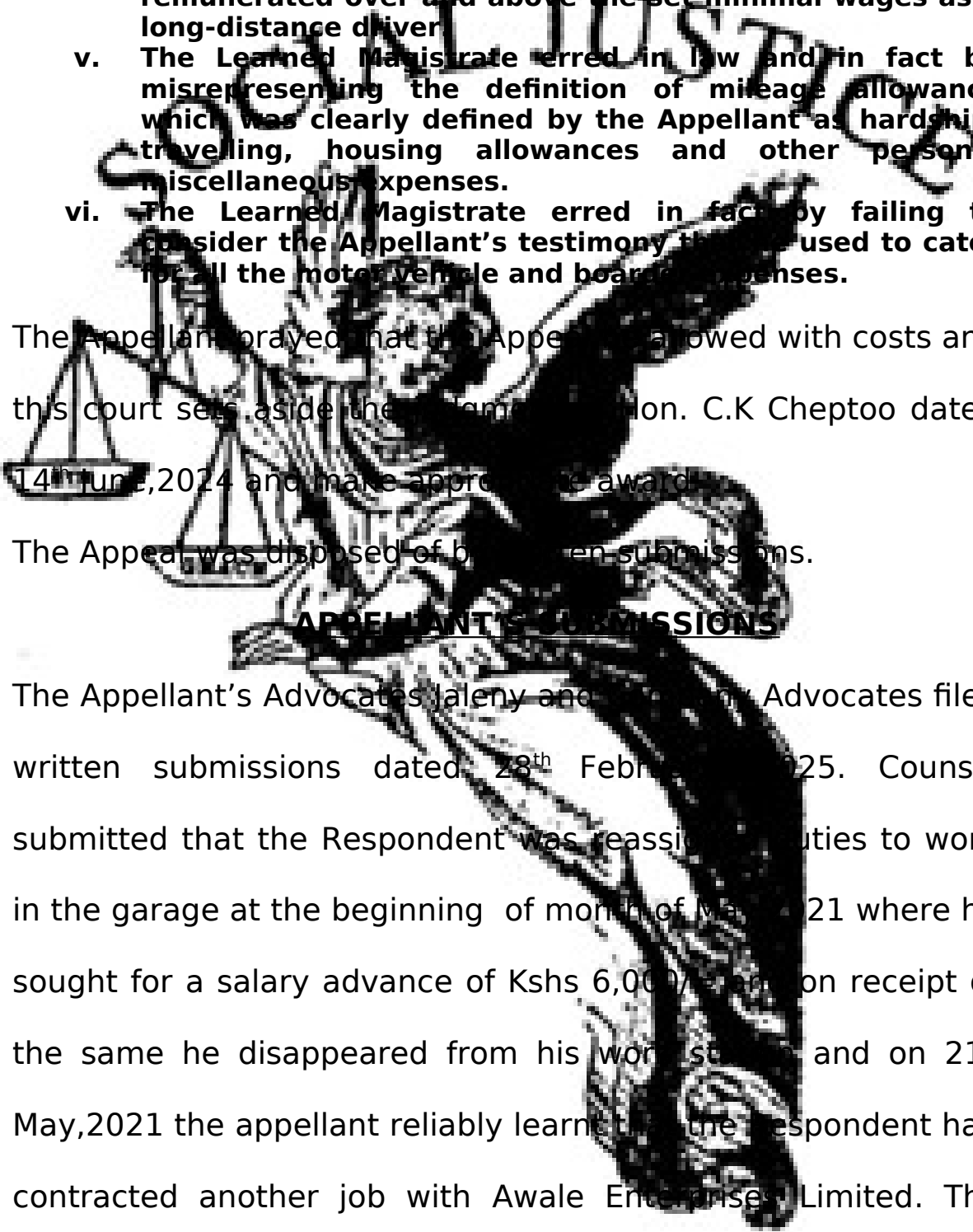
VERSUS

DANIEL OCHIENG OPIA.....
RESPONDENT

(Being an appeal arising from the judgment of Honourable C.K CHEPTOO delivered at Mitima Magistrate's Court in CMEL No. E2185 of 2021 on 14th July 2021.)

JUDGMENT

1. Through Memorandum of Appeal dated 1st July, 2024, the Appellant appeals against the whole of the judgment of Honourable C.K. Cheptoo delivered on 14th July 2024.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact by failing to acknowledge that the Respondent absconded his duties and opted to seek employment elsewhere without informing the Appellant.
 - ii. The Learned Magistrate erred in law and fact by delivering a judgment to the exclusion of the Appellant's testimony, documentary evidence and submissions.
 - iii. The Learned Magistrate erred in law and fact in arriving at the conclusion that the Respondent was deserving of any terminal reliefs.

- 
- iv. The Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent was being remunerated over and above the set minimal wages as a long-distance driver.
 - v. The Learned Magistrate erred in law and in fact by misrepresenting the definition of mileage allowance which was clearly defined by the Appellant as hardship, travelling, housing allowances and other personal miscellaneous expenses.
 - vi. The Learned Magistrate erred in fact by failing to consider the Appellant's testimony that he used to cater for all the motor vehicle and board expenses.

3. The Appellant prayed that the Appeal be allowed with costs and this court sets aside the judgment of Hon. C.K Cheptoo dated 14th June, 2024 and make appropriate award.
4. The Appeal was disposed of by the following submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates Jaleny and Mwangi Advocates filed written submissions dated 28th February 2025. Counsel submitted that the Respondent was reassigned duties to work in the garage at the beginning of month of May 2021 where he sought for a salary advance of Kshs 6,000/- and on receipt of the same he disappeared from his work station and on 21st May, 2021 the appellant reliably learned that the Respondent had contracted another job with Awale Enterprises Limited. The Appellant produced the contract in court. Counsel further

contended that Appellant never terminated the Respondent's employment and no evidence was produced by the Respondent to prove as such.

6. On the issue of constructive dismissal of the Respondent counsel submitted that it only occurs when an employee resigns because their employer's behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. That since resignation is not voluntary it is a termination. That the Employment Act does not make explicit reference to constructive dismissal but it could be construed under section 45 where an employer may terminate employment contract.

7. Counsel submitted that factors such as non-payment of remuneration, demotion in rank, failure to pay an employee with work and serious cases of sustained discrimination or mistreatment or if the employer unilaterally varies terms of the contract.

8. Counsel submitted that an employee can obtain redress for constructive dismissal provided the employee resigned within

reasonable time from his employment with or without notice as a result of the employer's hostile treatment or hostile working conditions at his work place. That the employer must have expressed the desire to terminate the employee. That the employee should not have consented to the change prior to the resignation. That suspension for indefinite period with no pay amounted to constructive dismissal.

9. Counsel further submitted that an agreement between an employer and an employee does not amount to constructive dismissal. That voluntary resignation of employee merely to avoid appearing at the disciplinary hearing will not constitute constructive discharge since the employee is entitled to proceed with the hearing in the absence of the employee.

10. Counsel relied on the case of **Coca Cola East Africa Limited Vs Maria Kagai Ligaga** (2015) CLR on legal principles to determine constructive dismissal. That in this case there was no evidence adduced before the trial court that the Appellant created an intolerable work environment or any deliberate acts of coercion, threats or duress.

11. Counsel further submitted that the Respondent never presented any evidence to justify why he absconded duty during the month of May, 2021. That section 47(5) of the Act provides for respective burdens of employee and employer where the employee must illustrate occurrence of unfair termination while the employer should state the grounds of the termination.

12. Counsel submitted that the burden that lies on the employee cannot lie on procedural technicalities like employer producing show cause letter and failure to issue disciplinary letter.

13. Counsel submitted that the trial court failed to scrutinize and appreciate oral evidence adduced by both the Appellant and the Respondent to establish the fact. That the trial court erred while passing its judgment against the Regulation of Wages (General) (Amendment) Order 2018 which provides for a minimum wage of Kshs 30,627/= inclusive of house allowance for a driver of heavy commercial vehicles.

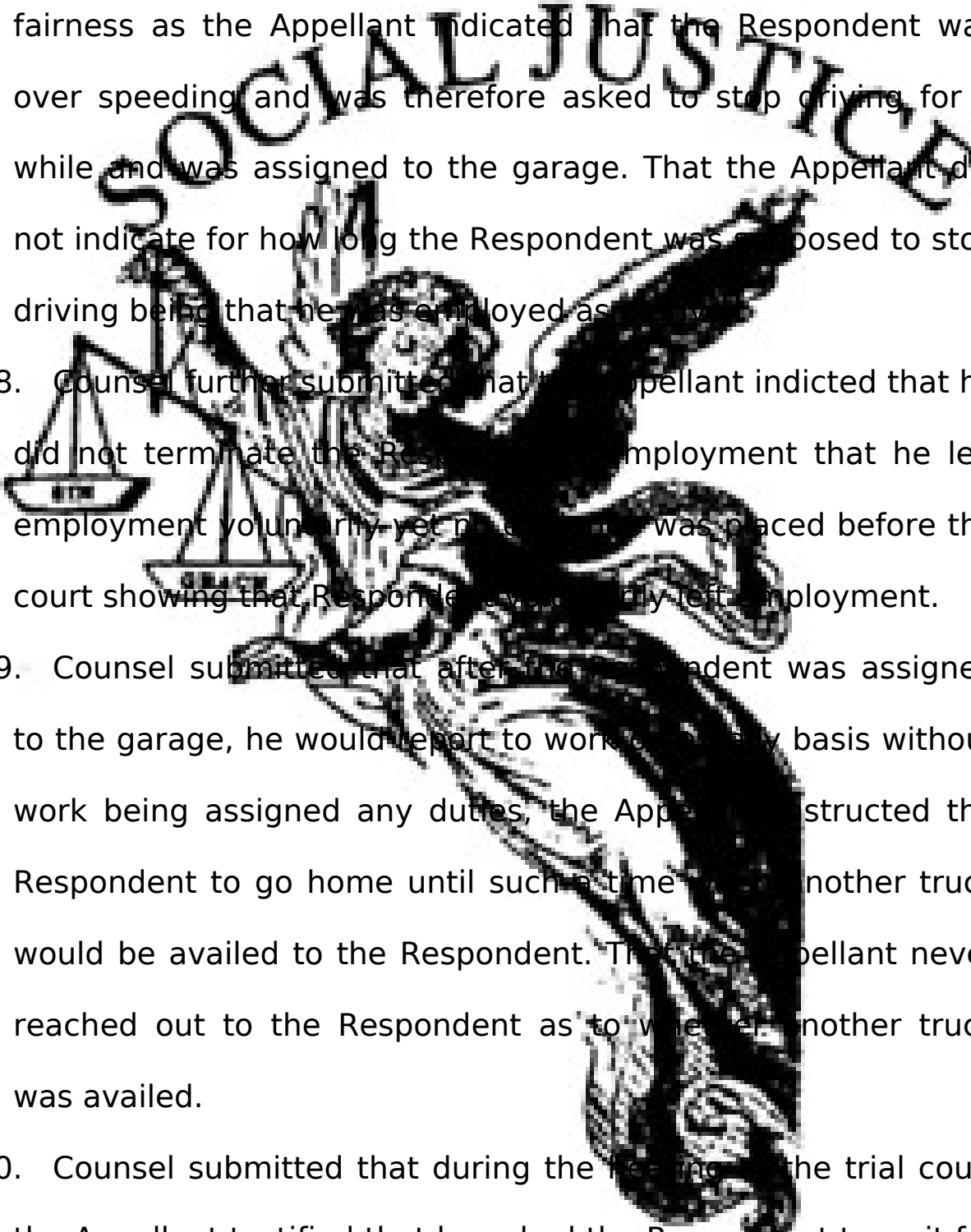
14. Counsel submitted that the trial court erred in the figure of Kshs 30,627/= in awarding general damages and underpayments noting that the figure was inclusive of house

allowance but still awarded the Respondent house allowance which was a double jeopardy and it should be set aside.

SOCIAL JUSTICE

RESPONDENT'S SUBMISSIONS

15. The Respondent's Advocates Faith Akoth Aketch & Co. Advocates filed submissions dated 7th July 2025 and on the issue of whether the Respondent was unfairly and unlawfully terminated from employment by the trial court, counsel submitted that for termination to be deemed both fair and lawful there must be substantive and procedural fairness while relying on among other cases of **Walter Anuro case** and the case of **Willie Kipkech Langat v County Public Service Board & 2 Others (2022) eKLR** and section 45 of the Act.
16. On the substantive fairness counsel submitted that the same should incorporate fair and valid reason for dismissal pegged in law. Counsel relied on section 43(2) of the Act that the reasons ought to be those the employer genuinely believed to exist and which caused the employer to terminate the service of the employee.

- 
17. Counsel submitted that in this case there was no substantive fairness as the Appellant indicated that the Respondent was over speeding and was therefore asked to stop driving for a while and was assigned to the garage. That the Appellant did not indicate for how long the Respondent was supposed to stop driving being that he was employed as a driver.
18. Counsel further submitted that the Appellant indicated that he did not terminate the Respondent's employment that he left employment voluntarily yet nevertheless was placed before the court showing that Respondent voluntarily left employment.
19. Counsel submitted that after the Respondent was assigned to the garage, he would report to work on a daily basis without work being assigned any duties, the Appellant instructed the Respondent to go home until such a time that another truck would be availed to the Respondent. The Appellant never reached out to the Respondent as to whether another truck was availed.
20. Counsel submitted that during the hearing at the trial court the Appellant testified that he asked the Respondent to wait for the motor vehicle that he was supposed to use to come from

the garage. That no information was availed as to whether the said motor vehicle was at all cleared from the garage.

21. Counsel relied on the case of **Mary Chemwero Kiptui v Kenya Pipeline Company Limited (2014) eKLR** on validity of reasons for termination which must touch on grounds of misconduct, poor performance or physical incapacity.

22. On the procedural fairness, counsel relied on section 41 of the Act on the required procedure and the case of **Donald Odeke v Fidelity Security Services (2012) eKLR** where it was held that if an employee is terminated whatever the offence the termination is unfair.

23. Counsel submitted that the Respondent was never issued with a show cause letter, he was not given the reason for termination, his representations were not considered before termination, no disciplinary hearing was held, he was never informed that he could be accompanied by fellow employee. The respondent was never issued with a termination notice or salary in lieu. That there was also no exit interview letters hence the termination unlawful for lack of procedural fairness.

24. Counsel further submitted that no evidence was tabled by the Appellant indicating that the Respondent actually deserted or absconded work as alleged. That the Appellant only produced a text message that could not be traced back to the Respondent. That apart from the Kshs 6,000/- the Respondent was paid there was no evidence he worked the remainder of the salary for May despite showing up for work.

25. Counsel submitted that the burden to prove desertion lied on the Appellant while relying on the case of **Oyudu v Digital Sanitation Services Limited Appeal E09 of 2023 (2024) KEELRC 02 (KLR)**. The Respondent never issued a notice to the Respondent on alleged desertion and thereafter if he failed to comply issue a termination letter. That during hearing the Appellant confirmed not showing the letter was issued or hearing held.

26. Counsel further submitted that the reason for desertion could not hold water since there was no evidence supporting it or evidence of the Appellant reaching out to the Respondent. Counsel further relied on among others the case of **Albanus Mbuithi Mutiso v Fresh Breeze Limited Cause No. 851 of**

2017 on the steps an employer should take to bring an absconding employee to account.

27. Counsel also relied on section 44(4) (a) of the Act on the issue of absconding duty constituting a gross misconduct yet the Appellant never commenced any disciplinary action on such gross misconduct as required by section 41. That no attendance register was produced to show that the Respondent absconded duties.

28. On the issue of whether the Respondent was entitled to terminal dues amounting to Rs. 9,917.50 awarded by trial court counsel submitted that there was no single evidence produced by the Appellant before the court indicating that the Respondent was paid his terminal dues. An employee is entitled to terminal dues regardless of what employee has done as the same are employee dues earned in the course of employment.

29. On the claim for damages for unlawful termination counsel submitted that the Respondent was entitled to same having proved that the Respondent did not abscond duties and he had worked with the Appellant for four years without any history of

misconduct. The Respondent could be sent to danger areas like Goma in Congo without complaint and the Appellant acknowledged he was a good employee. That the Respondent sought for 12 months compensation yet the trial court awarded him six months which was less than what he pleaded.

30. On the claim for one month notice pay counsel relied on sections 35 and 36 of the Act on this entitlement and on the case of **Kennedy Ochieng' Ochieng' v Arya Samaj Kisumu(2022)** eLR to show that the Respondent was entitled to the one month notice pay awarded by the trial court.

31. On the claim for service pay for 30 years counsel relied on section 35(5) of the Act on such an entitlement where an employee was not a member of NSSF and that there was no evidence tabled to show that the Respondent was a member of either. That the trial court awarded the Respondent 15 days for each completed year and the Respondent was entitled to the same.

32. On the claim for accrued unpaid leave counsel relied on section 28 of the Act on this entitlement and the case of **Union of National Research and Allied Institute Staff of Kenya**

(UNRISK) V Kenya Industrial Research and Development Institute (KIRDI) (2018) eKLR

that an employer pays leave as 30 days salary. That no evidence was produced to show the Respondent took his annual leave during his employment. That the court awarded the Respondent 21 days of leave for three years while citing the doctrine of limitation under section 90 of the Act instead of the claimant's four years. That the Respondent was entitled to the same.

33. On the claim for underpayment, counsel submitted that during hearing the Appellant's counsel failed to pay the Respondent Kshs 29,000/=. That the regulation of wages (General) (Amendment) Order 2018 provided for a minimum wage of Kshs 30,627/= for a driver of commercial vehicles. That the salary was exclusive of house allowance. That the court awarded three years underpayment citing the doctrine of limitation under section 90 of the Act.

34. Counsel submitted that the courts have previously pronounced themselves on the doctrine of limitation of time over claim for underpayment and salary arrears that the employee is entitled to the same irrespective of time lapsed.

Counsel relied on the case of **Kathra Hussein Noor & Another v Kaderina Haje Essak Limited (2016) KEELRC 509 (KLR)** on this assertion while submitting that the Respondent was entitled to the four years underpayments.

35. On the issue of whether the Respondent was entitled to house allowance court referred on section 90(1) of the Act on this entitlement while submitting that the Appellant admitted during hearing he never provided house allowance for the Respondent. That the Appellant stated that he provided the Respondent with mileage allowance which he was supposed to use for accommodation but the Respondent alleged that mileage allowance was supposed to cover the costs associated with the vehicle including boarder payments, fueling, maintenance and other road expenses. That the Respondent would sleep in the vehicle as there was no house allowance. That the trial court awarded house allowance for three years citing the limitation of time under section 90 of the Act and the court should uphold the same. That the Regulation of Wages (General)(Amendment) Order 2018 is exclusive of house allowance.

DETERMINATION

36. The court has considered the grounds of appeal, the record of appeal and submissions filed by the both parties and takes the view that issues placed by the parties for determination in the appeal could be condensed to two issues namely: -

- a. *Whether the trial court erred by finding that the Respondent was unfairly terminated.*
- b. *Whether the trial court erred by awarding the Respondent his terminal dues and reliefs sought.*

Whether the trial court erred by finding that the Respondent was unfairly terminated.

37. It is not in dispute that the Respondent was an employee of the Appellant from 2017 to April 2021 where the Respondent was engaged as a long-distance driver of heavy commercial vehicles.

38. The Appellant alleged that the Respondent left work voluntarily and went to seek work elsewhere at Awale Enterprises Limited when he was accused of over speeding and

reassigned duties at the garage. The Respondent on the other hand alleged that in May 2021 when he returned from his trip he was accused of over speeding which claims he denied and he was reassigned duties at the garage. He stated that he would report every day to work without being assigned any duties and that the appellant advised him to go home and they would call him back when they got another vehicle but was never called back.

39. The trial court on the other hand found that the Respondent's termination was unfair both substantively and procedurally. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the ruling in **Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR** among others.

40. The court is of the view that in as much as the Respondent had a duty under section 47(2) of the Employment Act to prove that termination occurred, the 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.

41. The Appellant alleged that the Respondent absconded duties for the month of May 2021 and sought employment somewhere else. Under Section 44(4) (a) of the Employment Act 2007, absconding duty by an employee constitutes gross misconduct and renders an employer liable for summary dismissal. The Appellant was in reference of desertion that the Respondent had no intention of returning to the place of work. The court guided by the sentiments in the case of **Stanley Onwoye Onchwesi v. School of Management Nakuru YMCA Secondary School** [2019] 1 KLR, where the court held that:-

18. Desertion can only take place where an employee leaves employment with the intention of not returning, or formulating such intention not to return after leaving. Desertion may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence, and nature of employee's duties.

42. The Appellant claimed that the Respondent absconded duty on May, 2021 yet the Respondent stated that he was never called back after being sent home. In addition, if the Respondent absconded duties the Appellant did not

demonstrate that he commenced any disciplinary action against the Respondent under section 41 of the Employment Act after he allegedly failed to report on duty.

43. It was held in the case of **Richard Kiplimo Koech Vs Yuko Supermarket Ltd [2015] eKLR** that absconding duty was an act of misconduct on the part of an employee, in which case the requirements of Section 41 of the Employment Act obtains.

44. In **Joseph Nzioka Vs Cement Coatings Limited [2017] eKLR** Nduma J observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable steps were made to contact the employer concerned and that a written letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

45. The Appellant’s assertions of text message could not pass fairness test as it was the Appellant’s duty to look for the Respondent. The Appellant ought to have produced call logs calling the Respondent back to duty. If attendance registers were produced by the Appellant or a warning to the Respondent that they were contemplating a disciplinary action due to the issue of absconding of duties.

46. On the claims of overspeeding in Congo the Appellant confirmed during hearing that he did not have any evidence of the same and the one who was accusing the Respondent dropped the charges. In addition, no disciplinary measures were taken by the Appellant on the Respondent on such allegations.

47. From the foregoing the Appellant agrees with the trial court that the respondent was effectively terminated when he was allegedly reassigned out of the garage but never assigned any duties.

48. The action by the appellant is in the definition of the constructive dismissal as was espoused by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where it was observed as follows: -

The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test

49. In the present case, the court is not satisfied that the Appellant has on a balance of probabilities discharged its onus of establishing that the Respondent absconded/deserted duty. The court agrees with the trial court's finding that the Appellant did not have fair reasons to terminate the Respondent.

50. On the procedural fairness as provided for under section 41 of the Employment Act, this court notes that the same was never adhered to as the Appellant did not issue any show cause letter to the Respondent on the issue of deserting/absconding of duties or over speeding, the Respondent was never invited for any disciplinary hearing hence the Appellant violated the clear provisions of section 41 of the Act.

51. This court is guided by the holding in the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited** [2014] 1 KLR that: -

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

52. In conclusion this court agrees with the trial court decision that the Respondent's termination was both substantively and procedurally illegal, unfair and unjustified.

Whether the trial court erred by awarding the Respondent his terminal dues and relief sought

53. On the issue of the trial court awarding the Respondent 6 months as compensation for wrongful dismissal which the Appellant faults as excessive, the Respondent suggests that this court should award 2 months compensation. The court agreed with the Respondent's compensation of six months. The court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of **Kenya Revenue Authority & Others v Darasa Investments Limited (2018) eKLR**. It was stated that:

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

54. The court will therefore disturb the awards herein only if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the

award of compensation is and the court should be guided by considerations set out under Section 49(4) of the Employment Act in awarding the damages herein.

55. In this case the trial court stated that it considered the unfair termination of the Respondent and the dedicated service by the Respondent to the Appellant of four years and awarded him the six months compensation. The court finds it justified and sees no reason to disallow it.

56. The award of one month notice was also justified after finding the Respondent was fairly terminated without notice as provided for under section 45 of the Employment Act.

57. On the claim for leave pay, medical allowance and underpayments this court agrees with the trial court but differs on the approach of 3 year limitation period under section 90 of the Act. The trial court misapplied and misinterpreted this provision.

58. The courts have pronounced themselves on these remedies that these claims in nature are continuing injuries which the Claimant must file their suit within 12 months after cessation of employment as per section 90 of the Employment Act. This

court notes that the employment relationship herein ended in May, 2021 and the claim was filed in November, 2021 which was within the 12 months period. The Respondent was therefore entitled to the years claimed and not three years as capped and awarded by the trial court.

59. In the recent Court of Appeal decision in **The German School Society & another v. [redacted] & another (Civil Appeal [2023] KECA 894 (K.R) [redacted] of 2023) (Consolidated)** [2023] KECA 894 (K.R) [redacted] of 2023) (Judgment) while relying on Indian decisions the court said this to say:-

Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking redress. With reference to the date on which the continuing wrong commences, such continuing wrong creates a continuing source of injury flowing from the excerpts reproduced above and considering the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the character of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.

60. From the above decision among many others not quoted it is clear those reliefs fall under continuing injury which were filed within 12 months. On housing allowance the Appellant did not produce any evidence that the Respondent's salary was

consolidated. This is a requirement under section 31 of the Employment Act and this court upholds the same award. The Regulation of wages (General) Amendment Order of 2018 provided for a monthly salary exclusive of house allowance. The mileage allowance given to the Respondent were to cater for other travel related expenses and he claimed he used to sleep in the motor vehicle for lack of house allowance. The same was awarded for the period the Respondent worked for the appellant and not three years as awarded by the trial court.

61. On the issue of leave pay, it is an entitlement to an employee by dint of section 28 of the Act. The Appellant did not produce attendance schedule or leave application forms and this court upholds the trial court's decision that the Respondent was entitled to the same for the four years worked not the capped period of three years by the trial court.

62. On the issue of service pay the court agrees with the trial court findings that the Appellant did not illustrate that it remitted the NSSF and NHIF dues for the Respondent hence he was entitled to the same. This is an entitlement under section 35 of the Act.

63. On the issue of underpayments, it was clear that the Appellant used to pay the Respondent Kshs 20,000/= as his monthly salary yet the minimum wage was Kshs 30,627/-. This court upholds the trial court award of underpayment as claimed and not as capped by trial court to three years.

64. In the upshot the Appeal is found unmerited is hereby dismissed with costs in the Respondent with only amendments on the continuing injuries claims capped by trial court at 48 months to full term of 48 months as follows:

- a. Underpayments.....Kshs 510,096/=
 - b. House allowance.....Kshs 10,514.40/=
 - c. Unpaid leave.....Kshs 755/=
- Total Kshs 521,365/-

65. It is so ordered.

Dated at Nairobi this 9th day of October, 2025

Delivered virtually this 9th day of October, 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

