

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA**

**APPEAL NO. E132 OF 2025**

**TARMAL WIRE PRODUCTS ..... APPELLANT**

**VERSUS**

**HANDSON TASITI SABOKE ..... RESPONDENT**

**[Being an appeal from the judgment of Hon. Kimani delivered on 4 July 2025 in  
Mariakani CMELRC No. E039 of 2022]**

**JUDGMENT**

The appeal arises from the judgment in Mariakani CMELRC No. E039 of 2022.

The appellant is seeking that the judgment be set aside and the respondent's claim be dismissed with costs.

The background of the appeal is a claim filed by the respondent before the lower court. His case was that he was employed as a general labourer from 1 July 2016 to 30 April 2022. He was paid a consolidated wage of Ksh. 9,664 per month. However, his case was that he was not entitled to take annual leave under Section 28 of the Employment Act (the Act) and had not been issued a written employment contract as required under Section 9 of the Act. The respondent claimed that on 30 April 2022, the manager called him and other employees to inform them that their services were no longer required due to a reduction in work. This was followed by the immediate termination of employment, without notice or due process, or payment of termination dues. He claimed that there was a redundancy that was not regular. He claimed the following terminal dues;

- a) Notice pay Ksh. 9,664.
- b) Severance pay for 6 years Ksh. 28,992.
- c) Leave pay for 6 years Ksh. 46,833.23.
- d) 12 months' compensation Ksh. 115,968.
- e) Certificate of service
- f) Costs of the suit plus interests.

In reply, the appellant's case was that the respondent was engaged under various term contracts, with his last being for the period between 25 March 2022 and 25 June 2022. He was employed as a general labourer at a consolidated wage of Ksh. 9,664 per month. On 8 April 2022, the respondent absconded from duty, prompting the appellant to issue him a notice to show cause. It was sent to his address through registered post. He did not respond or attend the disciplinary hearing on 24 May 2022. By absconding from duty, the respondent terminated his employment. There was due process, and the claims are not justified.

The learned magistrate heard the parties and, in judgment, held that upon a response that the respondent had absconded from duty, there was no proof of the procedures undertaken to address such gross misconduct. Under section 47(5) of the Act, the respondent had proved his case, while under Section 43 of the Act, the appellant had failed to justify the reasons leading to the termination of employment.

The learned magistrate made the following awards:

- a) Notice pay Ksh. 9,644.
- b) Ksh. 38,881 for unpaid leave days.
- c) 28,932 being compensation at 3 months' gross wage.
- d) Costs of the suit and interests.

The awards are subject to statutory deductions under section 49(2) of the Act.

The judgment aggrieves the appellant on five grounds that the learned magistrate erred in law and fact in finding that the respondent was entitled to notice pay, leave pay, damages for unfair termination, costs and interests. The trial court failed to consider the pleadings and documentary evidence submitted. Instead, it placed high value on the respondent's evidence and overlooked that he had not discharged his burden under section 47(5) of the Act.

The appellant also submitted that he filed records to demonstrate that the respondent absconded from duty, upon which he was issued a notice to show cause and an invitation to attend a disciplinary hearing. He failed to address or attend to the termination of employment.

The appellant submitted that the awards by the trial court were in error. They were based on 6 years of employment, whereas the respondent was under fixed-term contracts. Such findings should be reviewed and set aside with costs.

There are no written submissions by the respondent.

#### Determination

This is a first appeal. The court is required to review the record, reassess the findings and make its conclusions. However, consider that the trial court had the opportunity to hear and see the witnesses.

The fact of employment is not challenged. However, the respondent asserts that he was employed for 6 years, during which he was under fixed-term contracts, with the last contract running from 25 March to 25 June 2022. The appellant filed the contracts, which are not challenged. Fixed-term contracts are a lawful and legitimate mode of employment under section 10(3) of the Act. The court is bound to rely on the records submitted by the appellant.

The appeal is based on the fact that the respondent absconded from duty on 8 April 2022. The application sent a notice to show cause to his last address by registered mail. He was invited to the disciplinary hearing, but he failed to respond or attend. It is the appellant's case that there was no termination of employment but abscondment of duty.

Indeed, the respondent was under a written contract running from 25 March to 25 June 2022. He had a duty to attend work unless permitted to be absent. Abscondment of duty is an act

defined under section 44(4) (a) of the Act as gross misconduct and subject to summary dismissal. However, the employee is protected under section 41(2) of the Act to the extent that he must be issued a notice to attend and address such gross misconduct, albeit on short notice, as held in **Ratemo & 2 others v Dufourg [2025] KECA 1359 (KLR)**; **Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR)** and **Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR)**.

In this case, the appellant issued the respondent with a notice to show cause and a hearing notice dated 24 April 2024. These are attached at pages 36 to 38 of the Record of Appeal. The notices are sent to the respondent through their postal address by registered mail. He did not respond.

The appellant left matters at that point.

This was a gross error on the part of the appellant.

The employer has a duty to bring closure to employment in cases of alleged abscondment or abandonment. The employer must adhere to the provisions of section 18(5) (b) of the Act;

***(5) Upon the termination of a contract of service—***

***(a) ...***

***(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowances earned by him since the date of the employee's dismissal.***

The employer must end the employment relationship formally, particularly where the employee is on a fixed-term contract that is frustrated by abscondment. This is the position taken in the case of **County Government of Kwale v Kiptalam [2025] KECA 1310 (KLR)** and **Namale v Yako Supermarket Company Ltd [2025] KECA 1017 (KLR)**.

In this case, the learned magistrate properly addressed the facts and the law, arriving at a correct decision. There was an unfair termination of employment.

The notice pay and compensation awarded are justified.

Regarding the claim for unpaid leave over 6 years, under each contract term, the respondent had the benefit of 21 leave days per year as per clause 6 of the contract. This translates to 1.75 leave time per month, which is commensurate with section 28 of the Act.

The appellant filed leave forms to confirm that the respondent took his annual leave days. The last leave application is dated 7 March 2022. The respondent claims that his employment was terminated on 30 April 2022, whereas the appellant asserts there was abscondment on 8 April 2022.

For the unfair termination of employment, there is sufficient compensation together with notice pay. Such shall suffice.

On the claim for redundancy dues, the termination of employment is addressed above. This was not a redundancy but a case of unfair termination of employment. The term contract employment was due to end in June 2022. A compensation of 3 months' gross wage well compensates the respondent in this regard.

Regarding the award of costs and interest, the learned magistrate addressed the matter well, except that, in employment and labour relations claims, unlike commercial disputes, once the employee's rights are restored, costs and interest should only apply where the employer has frustrated the employee's access to their terminal dues and benefits. Such orders should only be issued in rare cases of gross malpractices and unfair labour practices.

On the claim for issuance of a Certificate of Service, this should be issued under each term contract in accordance with section 51 of the Act.

In this case, the only costs due are for the trial court proceedings. Interests shall only accrue if no payment is made within 30 days from the date hereof.

**Accordingly, judgment in Mariakani CMELRC NO. E39 of 2022 is reviewed in the following terms:**

- a) Compensation Ksh. 38,881.**
- b) Notice pay Ksh. 9,644.**
- c) Costs for the trial court.**
- d) For the appeal, each party to bear its costs.**
- e) The awards are subject to statutory deductions under section 49(2) of the Employment Act.**
- f) A Certificate of Service to issue under each contract in accordance with Section 51 of the Employment Act.**

Delivered in open court at Mombasa, this 16<sup>th</sup> day of October 2025.

M. MBARŪ  
JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....