



**Kamotho v Wamweya (Appeal E275 of 2024)  
[2025] KEELRC 2885 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2885 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E275 OF 2024  
DKN MARETE, J  
OCTOBER 22, 2025**

**BETWEEN**

**EUNICE KAMOTHO ..... APPELLANT**

**AND**

**ESTHER NJOKI WAMWEYA ..... RESPONDENT**

**JUDGMENT**

1. This matter originated by way of Memorandum of Appeal dated 30th October, 2023. It comes out as follows; That the learned trial magistrate erred in fact and in law in failing to appreciate that no factual evidence had been tendered by the Respondent to sufficiently demonstrates a case of unfair and unprocedural termination on 21st September, 2019 as found. That the learned magistrate erred in law and fact in finding for a case unfair and unlawful termination and thereby awarding service pay one month salary lieu of notice which award were made to the Respondent before leaving employment. That the learned magistrate also erred in law and fact by an award of underpayment without any basis, or at all. The award of payment in lieu of untaken leave was also erroneous in that the Respondent has not demonstrated a case of earned and unpaid for or uncompensated leave. The learned magistrate again erred in law and fact in the finding of unfair and unlawful termination of employment for the Respondent without considering the Appellant’s right to life which was grossly compromised by the Respondent misconduct and inaction which occurred in the twilight moment of employment even when this was brought to the attention of the court. The learned magistrate also fell in error by arriving at such wrong conclusion without regard to the fact that both parties had agreed to pursue a conciliatory approach instead of a criminal proceedings or other legal recourse for theft, assault et al and resorted to the permissible means of Alternative Dispute Resolutions [ADR.], and, The learned trial magistrate erred in law and in fact in not calling the Appellant to tender evidence whereas she was always willing and ready so to do.
2. The Respondent in their written submissions dated 26th June, 2025 submits in opposition to the appeal.



3. This appeal has a curious history. By an application dated 25th September, 2024 the Appellant/Applicant filed an application seeking leave to file and adduce additional evidence in support of their case. This evidence is espoused in paragraph 2 to 6 of the supporting affidavit for the application and also the annexed witness statement dated 15th September, 2024, to the application.
4. By a ruling of this court dated 26th March, 2025, this application was allowed. These two therefore becomes material for consideration in a determination of this appeal.
5. The issues for determination therefore are;
  1. What is the import of the additional evidence by the appellant on the appeal?
  2. Whether the learned magistrate erred in law and in fact in finding the case of unfair and unlawful termination of the Respondent's employment without any factual evidence.
  3. Whether the learned magistrate erred in making the various awards to the Respondent.
6. The 1st issue for determination is what is the import of the additional evidence by the appellant on the appeal? A narration of the evidence adduced by the Appellant/Applicant at paragraphs 2 to 6 of the supporting affidavit above referred is that during the trial of the matter now appealed against, the appellant was very vulnerable, sick and bound on a wheelchair. She suffered from Motor Neurone Disease which had been persistent for thirteen [13] years and during the trial, about three years earlier to the date of the application, the appellant was so subdued by the malady that she could neither move, speak cogently or hear anything with ease. She was therefore not audible to court and even when she was given an opportunity to tender her evidence, she was unable to due to this bounding disability.
7. The Appellant's further evidence is that she has now proceeded with treatment and has had modest recovery and would now be able to tell her side of the story. She is audible. The appellant therefore requested the court for leave to tender evidence on the goings on in the employment of the Respondent so as to facilitate a just and fair determination of the issues in dispute.
8. The actual evidence is captured under paragraphs 7 of the aforesaid supporting affidavit as follows;
  - i. the claimant, during a stay in employment took out all her leave days, and indeed additional off days more than permitted within the contract of employment I held with her.
  - ii. upon the agreement to separate, the claimant still stayed on her employment for one moth as she recovered from a leg injury she had sustained, and even after taking me to the Nairobi labour office [where I couldn't go physically, I was confined to a wheel chair [was allowed to return to work the notice period but she vanished.
  - iii. the claimant as such laid her grievances before me, after I had procured another home assistant and was given an opportunity to rebut any reasons why our work relationship had become untenable and as such, why I had to release her.
9. The Respondent [claimant] was offered an open opportunity to cross examine the Appellant on this but squandered the opportunity.
10. The Appellant in her witness statement dated 15th September, 2024 further narrates the history of engagement with the Respondent. This comes out as follows; That the Respondent took up employment with the Appellant as a house help in 2018. At the time of such employment, the appellant was very vulnerable, sick and confined to a wheelchair. That the appellant resides in a large family home in Kitusuru and therefore required help and assistant to facilitate her movement and also carryout households chores. That the Respondent was shopped from an employment bureau in Nairobi and was



assigned work on agreed terms and condition. That the appellant took up the Respondent also as family members and even enhanced her pay to Kshs.15,000.00 per month. In the first year of employment, the Respondent was very good and performed well. But with time changed tune and calls thereby becoming a haphazard and disorganized in her work with total disregard to the initial agreement on time duty, and decorum. That in 2019, on a visitation by the Appellant sister-in-law, her new dress disappeared or got lost from the house. That as a result of the Respondent's new attitude to work, the Appellant sought the assistance of external forces to cover up the Respondent's assignment thereby incurring extra costs for this service. The Respondent offered various but dubious excuses for her failures and inaction on duty. She had the option of off-duty which turn out to be more than the agreed annual leave of thirty [30] days. She also worked during public holidays and Sundays but this time on double wage which was very expensive, but indeed met. That due to her negative attitude towards work, some day she took me to the bathroom as was usual but left me completely unattended thereon so that I fell from the wheelchair and had to scream for help. I got rescued by my resident grandchild to much torment and anguish to date due to the indignity suffered. The Respondent towards the close of a close of her employment became an habitual absentees forcing the appellant to seek alternative help and on re-appearance, the Respondent would down play and offer lame excuses for her absence from work. That the Respondent developed an injured knee and the Appellant requested serve a month's notice as she looked for other employment. Despite having an alternative helper, the Appellant paid for the Respondent the notice period, but this notwithstanding, the Respondent raised a complaint of this notice issue. That the Appellant, to cure the issue of complaint offered a return to work to the Respondent but this was declined and met with this suit in court.

11. This is the background on which the claim should have been assessed and determined. It is notable that attempt to present this evidence clearly and fully at the trial court was frustrated by the medical condition of the Appellant. The Appellant, as aforesaid thereon offered herself for cross-examination by the Respondent on this evidence as of course.
12. It is notable that on allowing the application the application to tender further evidence, the parties left it at that. The Respondent particularly did not find the need to interrogate the further evidence by way of cross-examination. The parties leaped onto a determination of the appeal by way of written submissions.
13. In the Appellant written submission dated 20th June, 2025, a reiteration of her case and evidence is made. This comes out as is elaborately outlined above. So, in the circumstances, one is bound to ask as to whether the Respondent was indeed terminated from employment, if at all, by the Appellant.
14. The Appellant's case is that she was not able to fully testify and present her case at trial due to her multiple health issues. However, it is notable that she had presented a witness statement dated 20th August, 2021, bearing the same evidence that its now contained in her supporting affidavit and witness statement now dated 15th September, 2024 in support of application to tender further evidence in support of her case. The learned trial magistrate should have taken cognisance of the Appellant's medical condition and disability and relied on the witness statement presented before her in determining the issues in dispute. In any event, both parties were represented by counsel thus making it easier for the trial court to seek ways and means of facilitating a fair hearing in the circumstances. This was not to be.
15. I would agree with the case and submission by the Appellant that the trial court erred by finding a case of unprocedural and unlawful termination of employment without sufficient and demonstrable evidence by the Respondent in support of such position. A look at the witness statement of the Respondent at trial vis-à-vis that of the Appellant tells a tale of a case overwhelmed by that of Appellant. This is again resoundingly outweighed by the later evidence of the Appellant at this appeal.



16. It is not explained or understandable as to why the Respondent cowered from testing the evidence of the Appellant, even at this level when she had an open opportunity to cross-examine the Appellant on the same. Cumulatively, the case and evidence of the Appellant overwhelms that of the
17. Respondent. She [Respondent] in the course of employment became unruly and untoward and had no regard or respect for her work or even employer. The employer was left to bear the pain of her malady and neglect, all combined. This is decipherable from the concrete and cogent evidence the Appellant. This additional evidence brings out a case of no termination or at the best, lawful termination of employment and I find as such. This answers the 1st and 2nd issues for determination.
18. This court agrees with the Appellant that the trial court found a case of unlawful termination of employment of the Respondent without any factual or evidential basis. The Respondent had not adduced compelling evidence of a case of unlawful termination of employment or even an award of any remedies in the circumstances. With the onset of the new evidence by the Appellant, such a finding becomes ridiculous. It would not have any basis whatsoever. At the best, it would amount to a mockery of justice.
19. On this finding, the other issues for determination fall by the way side. They are not useful material for determination.
20. I am therefore inclined to dismiss the appeal with orders that the Respondent bears the costs of this cause from the trial court to this appeal.

**DELIVERED, DATED AND SIGNED THIS 22ND DAY OF OCTOBER 2025.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

1. Mr. Otieno instructed by Otieno Aluoka & Company Advocates for the Appellant.
2. Miss. Kariuki instructed by Lemmy Regau & Company Advocates for the Respondent.

