



**Kimuyu v Unik Driving School (Appeal E258 of 2024)  
[2025] KEELRC 2993 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2993 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E258 OF 2024  
M MBARŪ, J  
OCTOBER 30, 2025**

**BETWEEN**

**MUSOMBA KIMUYU ..... APPELLANT**

**AND**

**UNIK DRIVING SCHOOL ..... RESPONDENT**

*(Being an appeal from the judgment on Hon. Ombata delivered  
on 22 November 2024 in Mombasa CMELRC No. E757 of 2023)*

**JUDGMENT**

2. The appeal arises from the judgment delivered on 22 November 2024 in Mombasa CMELRC No. E757 of 2023. The appellant is aggrieved by the judgment on the grounds that the learned magistrate erred in law and fact in finding that the appellant had not proved his case and that there was a verbal termination of his employment. The court failed to appreciate that the claim of desertion of duty was not proven, and there was no due process leading to an unfair termination of employment.
3. The appellant is seeking that the trial court judgment be set aside and his claim be allowed with costs.
4. The background to the claim was facts that the appellant was employed by the respondent as an instructor in January 2015 and worked until 17 March 2023, when his employment was unfairly terminated. At the time, he was earning Ksh. 17,000 per month. His case was that on 14 March 2023, the respondent verbally terminated his employment without due process, after 9 years of service. He claimed the following terminal dues:
  - a. Notice pay Ksh.17, 000.
  - b. Severance pay for 9 years Ksh. 76,500.
  - c. House allowance for 9 years Ksh.275, 400.



- d. Damages for unfair termination of employment at 12 months Ksh. 204,000.
  - e. Costs of the suit.
5. In reply, the respondent denied the claims and that the applicant was employed in February 2019 as an instructor driver on 3 3-month probation. He, however, abandoned his employment on 17 March 2023. He terminated his own contract of employment when he reported to work on 17 March 2023. At the time, the respondent had received numerous complaints from its students and third parties regarding the appellant's general behaviour. He had been asking students for money in exchange for teaching favours. He tended not to show up for work without notice. He had failed to follow policy requirements, especially reporting to work with an unironed uniform and littering the environment. He caused an accident resulting in the injury of a person and damage to the respondent's motor vehicle registration number. KDH 519B. The claims made should be dismissed.
  6. The learned magistrate heard the parties and held that the appellant's allegations that his employment was verbally terminated by Osman and Mohammed were made by persons who are unknown to the respondent. There was proof that he had secured new employment with a third party, which explains his failure to report for work with the respondent. Hence, under section 47(5) of the *Employment Act* (the Act), the appellant had failed to prove unfair termination of employment.
  7. The learned magistrate dismissed the appellant's case with costs to the respondent.
  8. The appellant submitted that he established that he was an employee of the respondent and that his employment was terminated verbally. No work records were submitted regarding his employment. The legal duty to keep and provide the court with work records vests on the employer as held in *Gilbert Kasumali Kithi v Nyali Beach Holiday Resort* [2015] eKLR.
  9. Under section 47(5) of the Act, the appellant proved there was unfair termination of employment. The respondent failed to discharge its burden under section 43 of the Act. There was no justification for the termination of employment as held in *Rebecca Ann Maina & Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR. The allegations that he failed to report for work lacked evidence. The trial court was unable to interrogate such a matter and hence arrived at an erroneous judgment. The respondent did not produce any telephone calls or phone messages informing the appellant of any misconduct or recalling him to work due to the alleged abscondment of duty, as held in *James Okeyo v Maskant Flower Limited* [2015] eKLR.
  10. The appellant submitted that his claim should be reassessed and allowed as prayed.
  11. The respondent submitted that the Record of Appeal was filed out of time contrary to Rules 11, 14, 15 and 72 of the Employment and Labour Relations Court (Procedure) Rules. The appeal is invalid and should be expunged.
  12. On the appeal, the respondent submitted that the respondent's case was based on allegations that Osman terminated his employment. He never called such persons to support his case. The trial court established that the respondent did not have such a person as its employee to warrant dismissal of the appellant.
  13. According to the work records, the appellant had a severe attendance record, and letters were produced to support this misconduct. He worked until 17 March 2023, when he failed to attend work.
  14. The trial court addressed the evidence well and held that the appellant had failed to discharge his burden of proof under section 47(5) of the Act. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the court held that an employee must first prove that there was unfair



termination of employment to allow the employer to discharge its burden of proof and justify the termination under section 43 of the Act. The appellant failed in this regard. The respondent had no duty to justify the termination of employment.

15. In any event, the appellant had a poor work record, as evidenced by various letters and warnings.
  - a. A warning letter dated 22 March 2023 concerning absence from work without notice,
  - b. A warning letter dated 8 November 2021 for soliciting money from students.
  - c. A final warning letter dated 9 April 2021 for absenteeism.
  - d. A warning letter dated 18 February 2021 for littering from a company vehicle.
  - e. A warning letter concerning an accident caused by the appellant on 13 June 2022, which injured a person and damaged a company vehicle.
16. The appellant's assertion that he was mistreated lacks evidence, given the various incidents of gross misconduct for which he was issued warning letters. The trial court correctly analyzed the evidence before it and dismissed the claims with costs.
17. Notice pay and compensation are not due. House allowance was paid under the consolidated monthly wage of Ksh.17, 000.

### **Determination**

18. This is a first appeal. The court is called upon to review the entire record of appeal, reassess the trial court's findings, and make its conclusions. However, consider that the learned magistrate had the opportunity to see and hear the witnesses.
19. The basis of the plaintiff's case is that the respondent verbally terminated his employment on 17 March 2023. He testified that Osman and Mohammed verbally and unlawfully terminated his employment without due process.
20. On its part, the respondent asserts that on 17 March 2023, the applicant failed to report to work. At the time, he had committed various acts of gross misconduct. He had been issued warning letters, including one for causing an accident using the respondent's motor vehicle registration number. KDH 519B injured a person.
21. The respondent asserts that the appellant frustrated his employment by failing to report to work. He absconded from duty.
22. The court has emphasized that the employer has a duty to end the employment relationship. Where an employee abandons employment through abscondment, desertion or absenteeism, the employer must invoke the provisions of section 18(5) (b) of the *Employment Act*. Written notice terminating the employment relationship must be issued and served upon the labour officer to confirm that the employee no longer works for the stated employer.
24. In the case of *Odero v Guardian Coaches Limited* [2023] KEELRC 2382 (KLR); *Wambua v Open Hire* [2022] KEELRC 12708 (KLR); and the case of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] KEELRC 229 (KLR), the court held that Desertion, being a unilateral act of abandonment of the contract, cannot operate to bring a contract of service to closure until the employer acts on it.



25. This position is emphasized in *James Okeyo v Maskant Flower Limited* [2015] eKLR that the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.
26. In *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] KEELRC 141 (KLR), the court held that for absence of an employee from duty to constitute abandonment of the contract, the employer must demonstrate that he has addressed the matter either by instigating disciplinary action against the employee or making other deliberate effort to get the employee to resume duty to no avail. In this case, the appellant was left at large for alleged abscondment from duty. His claim that he was verbally dismissed is correct in the absence of the respondent, the employer, taking any disciplinary action against him and, fundamentally, failing to exercise its right under the Act to terminate the employment relationship formally.
27. Without adhering to the procedures under sections 35 and 41 or 44 of the Act, the respondent unfairly terminated the employment of the appellant.
28. The trial court failed to consider that there was no notice of termination of employment. The appellant is entitled to notice pay and compensation.
29. At the time, the appellant was earning Ksh.17, 000 which is due in notice pay.
30. However, when assessing compensation for an employee who has been unfairly terminated, the court must consider the employee's work record under section 45(5) of the Act. It is not in dispute that at the time the appellant's employment terminated, he had a litany of warning notices, including absences from work without permission, soliciting money from students, and causing an accident on 13 June 2022 that resulted in injury to a person.
31. This record does not place the appellant in good standing to enjoy an award of compensation as held in *Broadways Logistics Limited v Abdulkadir* [2025] KEELRC 2567 (KLR) and the case of *Lilian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service & Gender & another* [2020] KEELRC 53 (KLR) that despite the lapse in securing the due process, where the employee has a poor record in employment, under section 45(5) of the Act, the court should take the record into account in assessing compensation.
32. Before the trial court, the evidence that at the time of the alleged desertion of duty, the appellant had secured new employment was not challenged. To make any award of compensation would be to reward gross misconduct, and the minimum of one month's pay shall suffice at KSh. 17,000.  
Severance pay accrues only in the event of redundancy.
33. Regarding the claim for payment of house allowances for 9 years, despite the reasons for the termination of employment, the outstanding dues owed to the employee should be addressed with a conclusion for each year.
34. The claim for house allowances is based on the fact that, for 9 years, the appellant was not paid the 15% due. The employment of a driving instructor is not regulated. The letter of employment is not filed to assist the court in assessing the treatment of the house allowance as being consolidated under the monthly wage of Ksh. 17,000. However, under the Minimum Wage Orders, the payment of Ksh. 17,000 was above the minimum wage in Mombasa.
35. In any event, a house allowance is classified as a continuing injury under section 90 of the Act. Such a claim must be addressed within 12 months from the date of cessation.



- 36. Where employment ceased on 17 March 2023, the claim before the trial court was only filed on 22 November 2023.
- 37. On costs, the appeal is partially successful. It is fair that each party bears its costs for the appeal and trial court.
- 38. Accordingly, the appeal succeeded only to the extent that the appellant’s employment was terminated unfairly and is entitled to Ksh. 17,000 in notice pay plus compensation at Ksh. 17,000 to be subjected to statutory deductions under section 49(2) of the Act. Each party to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA, THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

