



**Fuchingo v Robinson Security Group also known as Robinson Investment Limited
(Appeal E021 of 2024) [2025] KEELRC 3130 (KLR) (10 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3130 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL E021 OF 2024
DN NDERITU, J
NOVEMBER 10, 2025**

BETWEEN

BEATRICE VILIKA FUCHINGO APPELLANT

AND

**ROBINSON SECURITY GROUP ALSO KNOWN AS ROBINSON
INVESTMENT LIMITED RESPONDENT**

*(Being an appeal from the judgment and decree issued in BUTALI PMC ELRC
No. E010 of 2022 by Hon. R. S. Kipng'eno (PM) delivered on 23rd October 2024)*

JUDGMENT

I. Introduction

1. In undated judgment delivered on 23rd October 2024 the lower trial court dismissed the cause by the appellant (the claimant in the trial). Each party was ordered to meet own costs.
2. Thereafter, the appellant through Reece Mwani & Company Advocates commenced this appeal vide a memorandum of appeal dated 30th October 2024 raising the following grounds of appeal –
 1. That the learned trial magistrate erred in law and in fact in holding that appellant absconded deserted duty without evidence to that effect.
 2. That the learned trial magistrate erred in law and in fact in failing to hold that the respondent did not follow the laid down procedure under Section 45, 43 and 41 of the *akn ke act 2007 11 Employment Act*.
 3. That the learned trial magistrate erred in law and in fact in failing to appreciate the applicable law on termination of employment.



4. That the learned trial magistrate erred in law and in fact in failing to appreciate the facts and circumstances of the matter before the court and the submissions made on behalf of the appellant hence arriving at an erroneous decision.
5. That the learned trial magistrate erred in law and in fact failing to give reasons for his decision in dismissing the appellants claim in it's entirety.
3. The appellant is seeking for orders that the judgment of the lower trial court be set aside and judgment be entered allowing the appellant's claim as pleaded and prayed in the lower trial court.
4. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant Mr. Mukhabani filed written submissions dated 12th June 2025 while counsel for the respondent Mr. Bagada instructed by P. D. Onyango & Company Advocates filed submissions dated 4th September 2025.

ii. Background

5. In a statement of claim dated 5th May 2022 filed through Tunoi & Company Advocates the appellant pleaded that on or about 1st September 2016 she was engaged by the respondent as a female guard (guardette) and assigned to West Kenya Sugar Company Limited and Butali Sugar Mills Limited at an agreed monthly salary of Kshs8,700 =. It was further pleaded that on 26th August 2021 the respondent terminated the appellant unfairly and unlawfully. It was pleading that the verbal termination was unlawful and the appellant was allegedly denied a hearing and due process.
6. The appellant prayed for the reliefs that –
 - a. A declaration that the claimant's employment was unlawfully and wrongfully terminated by the respondent in violation of Articles 28, 41(1), 47, 48 and 50(1) of *akn ke act 2010 constitution the Constitution of Kenya, 2010*, as well as Section 42 of the *akn ke act 2007 11 Employment Act, No. 11 of 2007, Laws of Kenya*.
 - b. An award of damages for breach of contract and unlawful and wrongful termination of employment as hereunder:
 - i. Damages for unlawful termination
(12 months' salary) Kshs. 104,400 =
 - ii. One month's salary in lieu of notice Kshs. 8,700 =
 - iii. Unpaid leave (5 years) Kshs.52,200 =
Total Kshs.165,300 =
 - c. Double wage for public holidays worked.
 - d. Interest on (b) above at court rates until payment in full.
 - e. Certificate of service.
 - f. Costs of this suit plus interest at court rates until payment in full.
 - g. Any other relief that the court may deem fit to grant.
7. In a response to the statement of claim dated 12th July 2022 the entire claim was denied in toto and the lower trial court urged to dismiss the same with costs. It was specifically pleaded that the appellant terminated her employment by deserting duty.



8. Upon concluding the hearing of the both sides, the lower trial court delivered a judgment in the terms alluded to in the introductory part of this judgment. It is against that judgment that the appellant has now filed this appeal seeking for the orders set out in the introductory part of this judgment.

Iii. Submissions By Counsel

9. Counsel for the appellant identified the following three issues for determination –
1. Whether the appellant was lawfully terminated?
 2. Whether the appellant is entitled to relieves sought.
 3. Who bears the costs of the claim?
10. On the first issue counsel submitted that no disciplinary hearing was held and as such the termination was prima facie unlawful. It is further submitted that the termination offended Sections 35 & 45 of the *akn ke act 2007 11 Employment Act*. Counsel cited *Jane Nyandiko V Kenya Commercial Bank Limited (2017) eKLR* in demonstrating that the termination fell short of the provisions of Sections 41, 42, & 43 of the *akn ke act 2007 11 Employment Act*.
11. On the second issue, it is submitted that since the termination was evidently unfair and unlawful, based on the evidence adduced in the lower trial court, the appellant is entitled to the reliefs sought.
12. The court is urged to allow the appeal as prayed with costs to the appellant.
13. On the other hand, counsel for the respondent submitted that it is the appellant who terminated her own employment when she deserted duty. It is submitted that she failed and or refused to report back to work after she had been granted a compassionate leave to go burry her husband in September 2021.
14. Citing *Moses Ojani Khasaya V Wasso Security Company Limited (2017) eKLR*, *Pius Machafu Isindu V Lavington Security Guards Limited (2017) KECA 225 (KLR)* and, *Duncan Muyangu Kibisu V Mediterano Restaurant (2016) KEELRC 1830 (KLR)* it is submitted that having been the author of her own misfortune the appellant cannot be rewarded for her misconduct.

Iv. Issues For Determination

15. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, the following issues commend themselves to the court for determination in this appeal -
- a. Was the termination of the appellant, if at all, unfair and unlawful?
 - b. Whether the lower trial court arrived at the wrong and improper verdict and made the wrong and unlawful orders in the impugned judgment.
 - c. Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?
 - d. What appropriate orders should this court make in regard to the above issues and on costs?



V. Analysis & Determination

16. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle & Another V Associated Motor Boat Company Ltd (1968) EA*.
17. The appellant’s case is that she was an employee of the respondent as a female guard (guardette) from 1st September 2016 to 26th August 2021. Her last monthly salary is stated to have been Kshs8,700 =. It was further pleaded that the appellant was terminated by the respondent on 26th August 2021 without due process.
18. The foregoing was pleaded in paragraphs 3 to 7 in the statement of claim filed in the lower trial court dated 5th May 2022 – pages 3-5 of the record of appeal.
19. In a response to the statement of claim dated 12th July 2022, the fact of the employment is admitted. However, it is denied that the appellant was terminated but rather it stated that the appellant deserted duty after she had been allowed to go burry her deceased husband. In the circumstances, it was pleaded that the appellant terminated her own employment and as such she was not entitled to the reliefs sought.
20. In her testimony in the lower trial court the appellant adopted her statement dated 5th May 2022 filed with her claim as her evidence-in-chief and produced her filed bundle of documents as exhibits in support of her case.
21. In cross-examination the appellant admitted that she was allowed a week to go burry her husband in August 2021 but did not resume duty. She stated that she could not resume duty because she was taking care of her epileptic child. However, she did not have any medical records in support of that allegation.
22. During the trial in the lower court the respondent called one witness, Stephen Mususu, the human resources manager. He adopted his filed statement as his evidence-in-chief and produced the filed bundle of documents as respondent’s exhibits 1 to 3. He stated that the appellant failed and or refused to report back to work after she had been granted leave to go burry her deceased husband. He stated that the appellant effectively deserted duty. He stated that the respondent issued a desertion notice to the appellant and that the same was served upon the labour office. He denied that the appellant was unfairly or unlawfully terminated and stated that it is the appellant who terminated her own employment through desertion.
23. Upon the conclusion of the hearing, the lower trial court in undated judgment delivered on 23rd October 2024 found and concluded that the appellant had deserted duty. The lower trial court further found that the appellant was thus not entitled to any of the reliefs sought and dismissed the entire claim and ordered each party to meet own costs.
24. An elementary presumption of the law is that (s)he who alleges shall prove – see Section 107 of the *akn ke act 1963 46 Evidence Act*. It was thus upon the appellant to establish and prove that she was indeed terminated as pleaded. It was only upon establishing and proving that she was indeed so terminated that the respondent was obligated to justify the termination under Section 43(2) of the *akn ke act 2007 11 Employment Act*.
25. While Sections 10 & 74 of the *akn ke act 2007 11 Employment Act* place a legal burden on an employer to keep and avail records of employment, that does not shift the primary burden of an employee to prove the fact of alleged unfair and unlawful termination.



26. The evidence on record confirms that the appellant was an employee of the respondent as a guardette for the period from September 2016 to about 26th August 2021. This is not an issue in dispute.
27. It is further not in dispute that sometimes in August 2021 the appellant lost her husband and she was allowed compassionate leave to go burry the deceased. It is also not in dispute that the appellant did not report back to work after the agreed leave expired. Her explanation is that she was taking care of a sick child. She did not avail any evidence on this allegation and she made no efforts to contact the employer during her extended stay out of work.
28. It is due to this extended absence that the respondent compiled a list dated 12th September 2021 of employees who had deserted duty. Although RW1 stated that the same was submitted to the labour office it is not clear where the same was delivered to.
29. However, the parties agree that once the appellant was allowed compassionate leave to go burry her deceased husband in August 2021 she never reported to work. She did not avail evidence of any attempts she made to contact the respondent and inform why she had not reported back to work. Likewise, there is no evidence on record of any efforts by the respondent to contact the appellant.
30. This court takes the view that at the workplace the employer and employee are equals in the sense that they co-exist in a symbiosis relationship. An employee sells the labour and an employer buys the same on agreed terms and conditions as governed by the law. Once either party is no longer willing to play its part, the law allows termination of the relationship in accordance with the law. On this basis it is wrong and oppressive for a court to assume a burden on an employer to make efforts to trace a deserter who is either unwilling or avoiding contact with the employer.
31. As noted above, the appellant herein was granted compassionate leave to go burry her deceased husband in a week – both parties agree on this. However, she did not report back to work on the expected time and she made no efforts to contact the respondent to explain her extended absence and or apply for extension of the leave. The appellant testified in the trial that she stayed away to take care of a sick child. She admitted that she made no efforts to contact the employer.
32. All the documents and correspondences cited above were produced by the respondent as exhibits during the trial in the lower court.
33. It was upon the appellant to satisfy the lower trial court that she was indeed unfairly and unlawfully terminated as claimed and pleaded. However, this court finds and holds that the appellant did not establish and prove that she was indeed unfairly and unlawfully terminated as claimed and pleaded. The evidence on record is that the employment relationship between the parties indeed terminated when the appellant failed, refused, and or neglected to report back to work after her compassionate leave expired. That is how her name ended up in the list of deserters alluded to above.
34. There is no way that the respondent could force or coerce the appellant to report back to work. The court cannot fathom what else the respondent as an employer was supposed to do to convince the appellant to report back to work.
35. For the umpteenth time, the court shall restate that it is not the business of the court to descend into the workplace and taking over the management of the same. Employees are expected to obey lawful orders and directions from employers and those placed in authority by the employers. The court has no business interfering with such. An employee who fails, refuses, and or neglects to act on such lawful orders and or directions by an employer assumes the risk of the full consequences of such misconduct under Section 44 of the *akn ke act 2007 11 Employment Act*.



36. It is the finding and holding of the court that the appellant terminated her own employment, without notice, by deserting duty upon unilaterally extending her compassionate leave beyond the agreed period.
37. In the material part of the judgment the lower trial court stated that – The parties are agreed (sic!) that the claimant was granted compassionate leave when her husband died and that she never resumed duty soon after. The claimant alleged that her child was taken ill and had to attend to her treatment. Following this period of unexplained absence without permission, the respondent issued a desertion notice.

With respect, I find that the claimant ought to have reported for duty and seek (sic!) more time to attend to her sick child rather than continuing on an extended period of compassionate leave without informing the respondent and obtaining their permission. In this way, I find that the respondent was justified in issuing a desertion notice to the claimant.
38. This court agrees with the above reasoning of the lower trial court and therefore finds no reason(s) to faulting the decision arrived at by the lower trial court that indeed the appellant not only authored but indeed also executed her own termination. There is no way that the respondent was responsible for the said termination that, in fact, arose from misconduct on the part of the appellant who deserted duty as alluded to above.
39. The court has this far said enough in demonstrating that the appellant’s claim in the lower trial court was misconceived and that the lower trial court was right in holding that the same lacked merits.
40. The appellant ought to have reported back to work after the compassionate leave expired and if necessary seek an extension to take care of the allegedly sick child. Her continued unreported and unexplained absence from work amounted to desertion of duty and gross misconduct. Through her own misconduct the appellant terminated her employment and the court cannot reward or compensate the same.

Vi. Reliefs

41. The court has found and held that the appellant authored and executed her own termination. The court should not reward such misconduct and as such the reliefs sought in the lower trial court were misplaced and not available to her.
42. Likewise, this appeal is misplaced, misconceived, and without merits and the same is for dismissal.

VII. ORDERS

43. Flowing from the foregoing, the court makes the following orders –
 - a. This appeal is devoid of merits and the same is hereby dismissed.
 - b. However, the respondent shall within 30 days of this judgment unconditionally issue and supply the appellant with a certificate of service.
 - c. Each party shall meet own costs for this appeal and that of the trial in the lower trial court.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 10TH DAY OF NOVEMBER, 2025.

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DAVID NDERITU



JUDGE

Kakamega Elrc

