

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KAKAMEGA
APPEAL NO. E020 OF 2024

EVERLYNE NG'AYO APPELLANT

VERSUS

ROBINSON SECURITY GROUP

Also known as ROBINSON INVESTMENT

LIMITED RESPONDENT

*(Being an appeal from the judgment and decree issued in BUTALI
PMC ELRC No. E006 of 2022 by Hon. R. S. Kipng'eno (PM) delivered
on 23rd October 2024)*

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a judgment dated and delivered on 21st March 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 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 16th 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 3rd May 2017 she was engaged by the respondent as a guardatte and was assigned to West Kenya Sugar Company Limited and Butali Sugar Mills Limited at an agreed monthly salary of Kshs8,500/=. It was further pleaded that on 1st July 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 the Constitution of Kenya, 2010, as well as Section 42 of the 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.102,000/=

ii. One month’s salary in lieu of notice

Kshs.8,500/=

iii. Unpaid leave (5 years)

Kshs.42,500/=

Total

Kshs.153,000/=

further submitted that the termination offended **Sections 35 & 45 of the 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 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 upon transfer to Kisumu. It is submitted that she failed and or refused to report to work in her new station even upon issuance of a notice of desertion.
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 3rd May 2017 to 1st July 2021. Her last monthly salary is stated to have been Kshs8,500/=. It was further

pleaded that the appellant was terminated by the respondent on 1st July 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 but the respondent disputes the period thereof and states that the same run from June and not May, 2017, as pleaded by the claimant. It was also denied that the appellant was terminated but rather it stated that the appellant deserted duty upon her transfer from Butali to Kisumu. 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 aware of her transfer to Kisumu that was allegedly communicated to her orally. She stated that she had appealed the transfer. She admitted that she did not report to her new station on transfer.
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 5. He stated that the appellant failed and or refused to report to her new station in Kisumu and effectively deserted duty.

23. Upon the conclusion of the hearing, the lower trial court in undated judgment delivered on 22nd October 2024 found and concluded that the appellant had deserted duty upon transfer from Butali to Kisumu by failing to report to the new station. 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 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 Employment Act**.

25. While **Sections 10 & 74 of the 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 applied for a job with the respondent vide a letter dated 14th May 2017 and started

working with the respondent on 2nd May 2017 (sic!). It seems the deployment preceded the application.

27. In a list dated 17th August 2021 submitted to the labour office Kisumu on 31st August 2021, the appellant was named as one of the many guards who had deserted duty.
28. In a letter dated 27th July 2021 the appellant protested her transfer to Kisumu and was categorical that due to many factors including family she could not report to her new station on transfer. In a rejoinder dated 11th August 2021 the respondent, while empathizing with the appellant, informed her of the reasons for the transfer. The said letter was served upon the appellant on 17th August 2021.
29. As it turns out, the appellant did not report to the new station and hence her name featured in the list of deserters served upon the labour office in Kisumu by the respondent on 31st August 2021 alluded to above.
30. All the documents and correspondences cited above were produced by the respondent as exhibits during the trial in the lower court.
31. 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 and claimed. The evidence on record is that the employment relationship between the parties indeed

terminated when the appellant failed, refused, and or neglected to report to her new work station in Kisumu. That is how her name ended up in the list of deserters alluded to above.

32. There is no way that the respondent could force or coerce the appellant to report to her new station. The appellant was in contact and in communication with the respondent all along and was fully aware of her transfer to the new station. She protested the transfer but the respondent politely informed her of the reasons for the transfer. The court cannot fathom what else the respondent as an employer was supposed to do to convince the appellant to report to her new work station.

33. 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. A transfer is one such lawful order and direction in management of the workplace. 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 Employment Act.***

34. It is the finding and holding of the court that the appellant terminated her own employment, without notice, by deserting duty upon her

transfer from Butali to Kisumu.

35. The court 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 rejected a lawful transfer as alluded to above.

36. 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.

37. The appellant ought to have reported to her new station on transfer as she protested and appealed the transfer. Failure to report to her new station 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

38. 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.

39. Likewise, this appeal is misplaced, misconceived, and without merits and the same is for dismissal.

VII. ORDERS

40. 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 unconditionally issue and supply the appellant with a certificate of service within 30 days of this judgment.*
- 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