

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E321 OF 2024

ABDI KORANE.....APPELLANT

VERSUS

RICHARD KIPTARUS ARAP KURGOREN.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. C.K. Cheptoo (PM)
delivered on 18th October 2024 in Nairobi CMELRC No. E785 OF 2021)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. C.K. Cheptoo (PM) delivered on 18th October 2024 in Nairobi CMELRC No. E785 OF 2021 between the parties filed a Memorandum of Appeal dated the 7th of November 2024 seeking the following orders: -

- a) **The appeal be allowed and the judgment and/or decree delivered on 18th October 2024 by the lower court against the Appellant be set aside together with costs and this court be pleased to make a fresh assessment thereof.**
- b) **Costs of the appeal be awarded to the Appellant.**

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in law and fact by failing to demonstrate how she interpreted the text message from the respondent's wife as a clear indication of employment termination, without applying the correct legal threshold or evidentiary standards required to establish termination, particularly given that the message originated from a third party rather than the employer.
3. The Honourable Magistrate erred in law and fact by misinterpreting a text message that merely inquired whether the claimant had "gone" as conclusive proof of termination. The message's wording suggests uncertainty regarding the claimant's whereabouts rather than a clear statement of termination. By treating this question as evidence of termination, the magistrate failed to apply the correct legal threshold, leading to an erroneous conclusion unsupported by the message's plain meaning.
4. The Honourable Magistrate erred in law and fact by accepting a text message from the respondent's wife as conclusive proof of employment termination, without considering the informal and non-binding nature of the communication, which lacks the legal authority or formality required for lawful termination.

5. The Honourable Magistrate erred in law and fact by failing to consider credible evidence indicating that the claimant abandoned his duties by not reporting to work, thus, erroneously shifting the burden of proof onto the respondent to demonstrate lawful termination.
6. The Honourable Magistrate erred in law and fact by admitting and placing undue weight on a text message from the respondent's wife as conclusive evidence of employment termination, thus failing to apply the appropriate evidentiary standards in determining the validity of the alleged termination.
7. The Honourable Magistrate erred in law and fact by dismissing the respondent's claim of desertion of duty without requiring the claimant to provide a sufficient rebuttal.
8. The Honourable Magistrate erred in law and fact by awarding the claimant leave days and house allowance despite the claimant being paid a monthly wage of Ksh.22,000, which exceeds the statutory minimum wage of Ksh. 19,000, thereby constituting an all-inclusive payment as permitted under Section 31 of the Employment Act.
9. The Honourable Magistrate erred in law by awarding six months' salary as compensation for unfair termination without providing adequate justification based on the claimant's tenure

10. The Honourable Magistrate erred in law and fact by awarding the claimant costs and interest without adequately considering the reasonableness of the respondent's defense of desertion.

BACKGROUND TO THE APPEAL

11. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 23rd April 2021 seeking the following orders: -

- a. A declaration that the Claimant's termination was unprocedural and amounted to unfair termination.
- b. Kshs. 390,009.00 as particularized in paragraph 4 of this statement of claim.
- c. Costs of the suit.
- d. Certificate of Service
- e. Interests on (b) and (c) above
- f. Such further or other relief as this Honourable Court may deem fit (pages 10-12 of Appellant's ROA dated 30th June 2025).

12. The Respondent filed his Verifying Affidavit sworn on 23rd April 2021, as well as his witness statement of even date, and bundle of documents (pages 13-24 of ROA).

13. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 10th September 2021 (pages 56-58 of ROA). He also filed a list of witnesses dated 10th September 2021; and witness statement of even date (pages 59-60 of ROA).

14. The Respondent's case was heard on the 2nd of April 2024 with the Respondent testifying in the case. He relied on his filed witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant, Mr. Noora (pages 77-81 of ROA).
15. The Appellant's case was heard on 27th June 2024 with the Appellant testifying on oath. He relied on his filed witness statement as his evidence in chief and was cross-examined by counsel for the Respondent Mr. Bizimana (pages 81-84 of ROA).
16. The parties took directions on filing of written submissions after the hearing. They complied.
17. The Trial Magistrate Court delivered its judgment on the 18th of October 2024 allowing the Claimant/Respondent's claim to the tune of Kshs.255,369/- comprising of one month's salary in lieu of notice, six months' salary as compensation for unfair termination, plus costs of the suit (Judgment at pages 88-92 of ROA).

DETERMINATION

18. The appeal was canvassed by way of written submissions. Both parties filed.

Issues for determination

19. In his submissions dated 16th September 2024 (sic), the Appellant identified the following issues for determination, namely:-
 - i. Whether the judgment dated 18th October 2024 should be set aside;

ii. Whether the Respondent is entitled to the reliefs sought.

20. On his part, the Respondent identified the following issues for determination in his submissions dated 24th September 2025:

i. Whether the Respondent discharged the initial burden of proving that a termination had occurred.

ii. Whether the learned trial magistrate erred in law and in fact in construing the text message as communication of termination.

iii. Whether the Appellant discharged the subsequent and primary burden of justifying the fairness of the termination.

21. The court on perusal of the grounds of the appeal, finds that the issues for determination in the appeal are-

a. **Whether the trial court erred in finding unfair termination**

b. **Whether the respondent was entitled to relief granted.**

Whether the trial court erred in finding unfair termination

Appellant's submissions

22. It is our position that the learned Magistrate erred in law and in fact by finding that there was unfair termination despite the Claimant failing to discharge the required burden of proof by placing before the court prima facie evidence suggesting that an unjustified termination has occurred. The Trial Court merely accepted a text message from the Respondent's wife as

conclusive proof of employment termination, without any corroboration of actual termination, and without considering the informal and unbinding nature of the communication, which lacks the legal authority or formality required for lawful termination. The Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR held as follows:- "Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:"(5)For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer." [Emphasis added] So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45." The Respondent/Claimant's case against the Appellant herein is that the alleged termination of his employment happened on 4th March 2021 when he received a text message from the Respondent informing him that his employment had been terminated. He then proceeded to allege in cross examination, that the Respondent used his wife's phone to text him. Subsequently, the Respondent/Claimant, proceeded to support his allegations by producing before court a copy of the text message that read, "Morning u have gone ama thanks a lot for the service's I don't need a driver anymore will be sending u the cash when Baba is back hasate" From the inception, this text message, which serves as the pivotal evidence, or the so-called 'smoking gun' relied upon

exclusively by the Respondent/Claimant to substantiate his allegations of unfair termination, forms the cornerstone of his case. We however submit with the utmost respect that the Learned Magistrate committed a profound error both in law and fact by accepting this solitary piece of evidence as conclusive proof of unfair termination. This erroneous conclusion is untenable for such reasons as: the message's ambiguous language, its origin from a third party lacking contractual authority, and the absence of corroborative evidence to establish the employer's intent, all of which fatally undermine its weight as decisive proof of termination, let alone unfair termination, under the rigorous standards mandated by the Employment Act, 2007, and the Evidence Act, Cap 80. The Respondent/Claimant's evidence is contradictory and lacks credibility, as he alleged that the message was sent by the Appellant, when it was clearly from his wife. From the statement, "when Baba is back" translated to mean "when the Appellant is back", in this case, shows that the Claimant was clearly attempting to mislead the court. He did not provide any other evidence to corroborate his assertions that it was the Appellant who actually terminated his employment. Moreover, the text message's actual meaning, "Morning u have gone ama" suggests an inquiry into the Respondent's whereabouts ("ama" meaning "or" in Swahili) rather than a definitive termination. This, as had been stated by the Appellant during trial, was an inquiry after the Respondent/Claimant had deserted duty. This was not considered by the Trial Court. We hereby submit that the learned Magistrate erred in law and in fact by accepting a text message from the Respondent's wife as conclusive proof of employment termination, without any corroboration of actual termination, and without considering the informal and unbinding nature of the communication, which lacks the legal authority or formality required for lawful termination. This, coupled with the lack of any contractual relationship between the

Claimant/Respondent and the Appellant's wife and well as her lack of authority, negates any employer action and reinforces that no termination can be inferred post-desertion. The Lower Court's failure to address this dynamic renders its conclusion legally unsustainable. Besides, the Appellant's testimony of unawareness and lack of intent to terminate stands unchallenged on record. This uncontroverted evidence decisively negates the existence of any termination by the Appellant. The Lower Court's reliance on the wife's text as proof of termination, without corroboration of the Appellant's authorization or intent to terminate the employment, constitutes a perverse finding that flies in the face of the requirements of Section 45 of the Employment Act. The Lower Court dismissed this evidence without requiring the Respondent to discharge his evidential burden, erroneously shifting the onus to the Appellant, a clear violation of legal principles. 20. We humbly submit on the following ingredients to demonstrate that the Respondent/Claimant did not meet the threshold for unfair termination under Section 45 of the Act, rendering the Lower Court's finding unsustainable, which consequently warrants this appeal's success. We hereby submit as follows: i. The party who alleges bears the burden of proving unfair termination. Section 107 of the Evidence Act, Cap 80, imposes a mandatory burden: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." This is trite law, unassailable in employment disputes as required under Section 47(5) of the Employment Act. This burden is reinforced by judicial precedent. In *George Okello Munyolo v Unilever Kenya Limited* [2019] eKLR, the Court incisively held; "Again, it can be argued that the claimant has failed to adduce evidence in support of a case [of] unlawful termination of employment. He has failed to satiate his burden of proof as required of Section 47(5) of the Employment Act, 2007 which

comes out as follows: 'For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'" The Trial Court in the aforementioned case dismissed the claim for lack of proof, awarding only notice pay where applicable, underscoring that the employee's evidential threshold is paramount. In the instant suit however, the learned Magistrate ruled in favour of the Respondent/Claimant without holding him to this bifurcated burden. The Respondent merely produced an ambiguous text, not sent by his employer and Mpesa extract, which did not even prove that termination occurred at all, let alone unfairly. This falls woefully short of the evidential standard required under Section 47(5) and Section 107. The burden never shifted to the Appellant to justify termination, yet the Lower Court concluded that termination occurred, a finding that is not only perverse but legally untenable.

23. Termination has to have been effected by the employer himself - A consistent thread running through Section 45 is that termination presupposes an employer-initiated act following the employee's continued engagement under the contract. Additionally, for an employment contract to be deemed unfairly terminated, it must fully comply with Section 45(2) of the Act, embodying the essence of substantive and procedural fairness. Section 45 stipulates: A termination is unfair if the employer fails to prove valid, fair reasons and fair procedure. Critically, termination must emanate from the employer, who is the party to the contract. We submit that termination must be by employer or authorized agent. The text, heavily relied on by the Respondent herein, originated from the Appellant's wife, a third party with no privity

of contract. No evidence of agency or delegation was produced by the Respondent/Claimant to warrant him the orders issued. Consequently, third-party texts cannot be relied on as binding proof of termination. Besides, the Appellant testified that he was unaware of the alleged termination, and his testimony remains unchallenged, thus affirming his unawareness of and lack of intent to terminate the Respondent's employment. This, is a critical fact that the Lower Court overlooked. This lacuna renders the finding of termination by the trial court a gross misdirection.

Respondent's submissions

24. WHETHER THE RESPONDENT DISCHARGED THE INITIAL BURDEN OF PROVING TERMINATION - The Respondent submits in the affirmative. The Appellant misapprehends the nature of the initial burden under Section 47(5) of the Employment Act. This burden is not an insurmountable one; it is an evidential burden to establish a prima facie case that a termination has occurred. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, which the Appellant selectively quotes, explicitly clarifies the process: “So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1)...” The Respondent laid this foundation conclusively. The production of the text message which stated, “i don’t need a driver anymore will be sending u the cash when Baba is back”, was clear and unequivocal communication of dismissal. As held in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd* [2014] eKLR, courts are to consider the totality of evidence and the reality of employment relationships, which often

involve informal communications. 8. Contrary to the Appellant's strained interpretation, the phrase "Morning u have gone ama" in the context of the entire message does not suggest a mere inquiry. It is a rhetorical question preceding the dismissal, implying the Respondent's absence was being treated as a *fait accompli*. To argue otherwise is to ignore the natural and ordinary meaning of the words that follow. Furthermore, the Appellant's claim that the message came from his wife and not him is a red herring. The message explicitly references "Baba" (the Appellant) and his intention to send payment. This clearly indicates the wife was acting as an agent or a messenger for the Appellant. The Appellant did not lead any evidence to rebut the presumption of agency in this domestic employment context. The case of *CMC Aviation Ltd v Mohammed Noor* [2015] eKLR emphasizes that employers cannot hide behind procedural informalities to defeat substantive justice.

25. ISSUE NO. II: THE BURDEN SHIFTED TO THE APPELLANT TO JUSTIFY THE TERMINATION, WHICH HE SPECTACULARLY FAILED TO DO- The Respondent submits that once the *prima facie* case of termination was established, the legal and heavy burden shifted to the Appellant under Sections 43, 45, and 47(5) of the Employment Act to prove the reasons for termination and that it was fair both substantively and procedurally. This principle is settled law. In *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the Court of Appeal held: "The termination of the appellant's employment was therefore both substantively and procedurally flawed. The respondent did not discharge the burden placed upon it by sections 43, 45 and 47(5) of the Employment Act to prove the reason for the termination and that it was fair." The Appellant's failure in this regard is total and absolute. He led no evidence of: o A valid reason for termination (e.g., misconduct, poor

performance) as required by Section 43. Compliance with the mandatory procedural fairness requirements of Section 41, which entails notifying the employee of the reasons for termination and allowing them a hearing. The Appellant's silence in the face of the text message evidence is deafening. His purported "unawareness" is not a defence but an admission of his failure to adhere to the law. The termination was, by default, unfair. As held in *Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd* [2014] eKLR, where an employer fails to prove the reasons for termination, it is deemed unfair.

Decision

26. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- *'45(2) A termination of employment by an employer is unfair if the employer fails to prove—*
- (a) that the reason for the termination is valid*
 - (b) that the reason for the termination is a fair reason—*
 - (i) related to the employees conduct, capacity or compatibility; or*
 - (ii) based on the operational requirements of the employer; and*
 - (c) that the employment was terminated in accordance with fair procedure.'*
- To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

27. The existence of termination of employment service is at the core of a claim of unfair termination. The respondent in the witness statement stated that on the 4th March 2021, he

received a text message from the appellant informing him that his employment had been terminated (page 14 of ROA). The respondent in witness statement stated that he had employed the respondent as a driver and sometimes in march 2021 while on the road, the claimant called him over the phone and informed him that he was no longer interested in the work and abandoned the multivehicle on the road never to return again to work(para 2 of the statement at page 60 of ROA). During cross-examination, the Respondent told the court the termination was via text message and he had filed the same on 23rd April 2021. He said the appellant used the wife's phone to sent him the text. He was at home when he received the text. During cross-examination of the appellant told the court that it was not true the respondent abandoned the vehicle on the road. He said the claimant called him and told him he was no longer interested in the work. He said the driver did not turn up for work. That he did not call him as he was away on travel. His kids were stranded and his priority was to take another driver for his kids. He said it was the wife who communicated that the driver had not turned up, and he could not tell whether the driver communicated with his wife orally or in writing.

28. The court on perusal of the record did not trace the text message however the appellant did not dispute the message existed as per his ground of appeal to wit- *'The Honourable Magistrate erred in law and fact by accepting a text message from the respondent's wife as conclusive proof of employment termination, without considering the informal and non-binding nature of the communication, which lacks the legal authority or formality required for lawful termination.'* The trial court considered and cited the text message- *'the claimant herein avers that he was terminated through a text message sent to him by the respondent's wife. The*

respondent on his part avers that the claimant deserted duty. The plaintiff produced a text message extract from 0704497145. He avers that the same belongs to the claimant's wife. The text message read as follows; Morning u have gone ama thanks a lot for the service's i don't need a driver anymore will be sending u the cash when Baba is back hasate" The plaintiff produced his Mpesa statement confirming receipt of money from the said number. The respondent herein confirmed before the court that it is his wife who used to pay the claimant's salary, a fact that is confirmed by the Mpesa statement. This court finds that the claimant has proved on a balance of probability that he was terminated through text." The court finds no basis to fault the finding by the trial court that the termination was vide the said text message by the wife of the appellant. The court found that whereas the appellant may have employed the respondent, he had given authority to the wife to issue instructions to the respondent and pay salary, placing her at the same footing with him as employer. In a domestic setting of wife and husband the question of who is employer is blurred. The court is aware of the idiom that the husband is the head and the wife the neck. The court finds that biologically the neck controls the head. The court noted that the issue of the appellant's wife assuming employer role was not unusual in domestic work as the respondent stated that the driver was also for the kids. The text message was to effect that the appellant's wife no longer needed a driver. The alleged call log by the appellant to the respondent was not produced before the trial court and the only evidence was the said text message. The court found that the argument that a third party, the wife of the appellant could not have terminated the service to be untrue. The court finds that the decision of the trial court was not wrong or based on a misapprehension of facts and hence no basis for the court to interfere. (Mbogo v Shah). The court finds that the reason for the termination was not justified. There was no notice, nor was the respondent called by

the appellant to be informed of the reason for the termination, contrary to the provisions of section 41 of the Employment Act. The court finds that the trial court correctly applied the law in finding unlawful and unfair termination.

Whether the respondent was entitled to relief sought

29. The Trial Magistrate Court delivered its judgment on the 18th of October 2024 allowing the Claimant/Respondent's claim to the tune of Kshs. 255,369/- comprising of one month's salary in lieu of notice, six months' salary as compensation for unfair termination, plus costs of the suit.
30. The grounds of appeal were-
 - a. The Honourable Magistrate erred in law and fact by awarding the claimant leave days and house allowance despite the claimant being paid a monthly wage of Ksh.22,000, which exceeds the statutory minimum wage of Ksh. 19,000, thereby constituting an all-inclusive payment as permitted under Section 31 of the Employment Act.
 - b. The Honourable Magistrate erred in law by awarding six months' salary as compensation for unfair termination without providing adequate justification based on the claimant's tenure
 - c. The Honourable Magistrate erred in law and fact by awarding the claimant costs and interest without adequately considering the reasonableness of the respondent's defense of desertion.

31. The court finds the awards of leave and service are not contested in the appeal and the same are upheld
32. On compensation of 6 months the appellant submitted- Salary in lieu of notice and compensation for unfair termination. That the award for salary in lieu of notice and compensation for unfair termination are unjustified. The Claimant is neither entitled to compensation for unfair termination nor to pay in lieu of notice as he did not prove unfair termination of his employment by the Respondent. The court upheld unfair termination. The claimant had worked for 1 year and 5 months and was awarded compensation of 6 months. The claimant had not contributed to the termination. The court finds that the award is not excessive or based on wrong principles to have the court disturb the award (Butt v Khan).
33. The notice pay is upheld under section 35 of the Employment Act.
34. *Housing allowance*- The Appellant submitted that the Respondent's salary of Kshs. 22,000/= exceeds the minimum wage for a general labourer in urban areas, as per the Regulation of Wages (General) (Amendment) Order 2024, which is Kshs. 16,113.75, and the amendment order specifies that this amount includes housing allowances. Under an oral contract, this suggests an all-inclusive wage, a presumption unrebutted by evidence of separate entitlement. The court on this issue agreed with the appellant. The Respondent pleaded he was paid a monthly salary of Kshs. 22,000. This was an oral contract. The only reason the court would then find housing was not factored would be if the wages were pleaded to be below the

minimum wage order. The trial court did not make a finding on the issue. The salary was consolidated. The respondent submitted the wages order salary was Kshs. 19000. The court, for lack of evidence that the wages were below minimum wages, faulted the trial court for failing to find the Kshs. 22000 under oral contract was consolidated wages. The award is set aside.

35. On service pay the appellant submitted - This award is unjustifiable, since the Claimant was not aware which months were not paid. The Court holds that respondent was entitled to service pay for each complete year under section 35(5) of the Employment Act. He had served of 1 complete year and 4 months. The service pay was due as he was not under NSSF but for 15 days for the complete year worked thus $15/30 \times 22000 = \text{Kshs. } 11000$. The award of the trial court is set aside for non-compliance with section 35(5) of the Employment Act.

CONCLUSION

36. The appeal is partially allowed with respect to service pay and housing allowance only. The Judgment and Decree of the Hon. C.K. Cheptoo (PM) delivered on 18th October 2024 in Nairobi CMELRC No. E785 OF 2021 is set aside and substituted as follows -

The court makes a declaration that the claimant's termination was unprocedural and amounted to unfair termination. Judgment is entered for the claimant against the respondent as follows-

- a. Compensation for unfair termination – Kshs 132000**
- b. Notice pay Kshs. 22000**
- c. Leave days Kshs. 30800**

d. Service pay Kshs. 11000

e. The claimant is awarded the costs of the suit and interest from the judgment date.

f. The respondent is ordered to issue the claimant with a certificate of service within 30 days through the advocates office.

37. The appellant is awarded costs of the appeal.

38. It is so Ordered

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH
DAY OF NOVEMBER, 2025.**

**J.W. KELL,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Nura

Respondent – Bizimana