



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT KISII
APPEAL NO. E005 OF 2025

KUNAL
BENJAMIN.....**APPELLANT** AJIT

VERSUS

NEW OSHWAL DISTRIBUTORS
LIMITED.....**RESPONDENT**

(Being an Appeal Against the entire Judgment delivered on 16th April 2025 by Hon. J. Nyariki (SRM) in Kisii MCELRC E024 of 2023)

BETWEEN

KUNAL
BENJAMIN.....**CLAIMANT** AJIT

VERSUS

NEW OSHWAL DISTRIBUTORS
LIMITED.....**RESPONDENT**

JUDGMENT

1. The Appeal herein seeks the setting aside and vacation of the judgment of the Trial Court made on 16th April 2025. The Appellant was dissatisfied with the determination of the Learned Magistrate and thus raised the following grounds on appeal:-

- a. The Learned Trial Magistrate erred in fact and in law fact by finding that the Appellant had not proved his claim for unfair termination;
- b. The Learned Magistrate erred in law and fact by failing to determine if the Respondent had fairly and lawfully terminated the Appellant;
- c. The Learned Magistrate erred in law and fact by failing to determine if the Respondent had valid reason(s) and followed due procedure in terminating the Appellant;
- d. The Learned Magistrate erred in law and fact in finding that the Respondent terminated the Appellant based on gross misconduct;
- e. The Learned Magistrate erred in law and fact by relying on an inadmissible WhatsApp extracts/texts whose

phone number was not proved by the Respondent to belong to the Appellant;

f. The Learned Magistrate erred in law and fact by failing to award any of the prayers sought by the Appellant in the statement of claim.

2. The Appellant thus prays that the appeal be allowed and the judgment delivered on 16th April 2025 by the Trial Court be set aside, vacated and/or substituted with an order that the Appellant's employment was not validly, substantially and procedurally terminated. The Appellant also sought that costs of the appeal and costs of the claim in the lower court plus interests be awarded to the Appellant together with such other just relief as this Honourable Court may deem fit and just to grant.

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant submits that the issues for determination are:

a. Whether the Appellant proved his claim for unfair termination?

- b. Whether the Appellant was terminated fairly and lawfully?
- c. Whether the WhatsApp extracts/texts were admissible?
- d. If the Appellant was entitled to the reliefs sought?
- e. Who should bear the costs of the Appeal?

5. On the first issue, the Appellant submitted that it is trite that to succeed in a claim for unfair termination the reason(s) for the Claimant's termination, and the procedure adopted in effecting the termination are paramount. It was submitted that the Appellant's testimony before the Court was that he was employed by the Respondent on 1st December 2014 as a supervisor at Kisii branch till on 1st April 2023 when he was contacted by the Respondent's manager, Kalpesh Haria who informed him not to go to work as his employment had been terminated. The Appellant referred to page 104 of the record of appeal. The Appellant submitted that the Respondent's witness alleged that the Appellant deserted work but did not adduce any evidence to demonstrate the efforts taken, and the action it took against the Appellant for the absenteeism. The Appellant cited the case of **Felistas Acheha Ikatwa v**

Charles Peter Otieno [2018] KEELRC 2491 (KLR) where the Court held that;

The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.

6. The Appellant posited how can an employee desert for long periods without an employer taking an action against an employee? The Appellant submitted the Respondent's witness admitted that he did not issue any notice to show cause or warnings to the Appellant. It was submitted that the Trial Court relied on the WhatsApp extracts to conclude that the Appellant did not prove his case. The Appellant submitted that he testified during cross examination that the phone number 0735216000 used to text the WhatsApp texts did not belong to him. (See page 103 of the record of appeal). The Appellant submits that no evidence was

adduced by the Respondent to show that the said number is registered in the name of the Appellant. The Appellant submitted that the Respondent had to establish the registration of the said phone number and establish a connection with the Appellant. Further, it was submitted, the alleged WhatsApp extracts were not admissible. The Appellant submitted that he had proved his claim on a balance of probability as required and that a claim for unfair termination is a civil claim which ought to be proved on a balance of probability and not beyond reasonable doubt as determined by the Trial Court.

7. The Appellant submitted that if it was true that he deserted work or absconded his duties without permission, the Respondent ought to have taken action against him through summary dismissal. He submitted that no action was demonstrated by the Respondent to have been taken against the Appellant. He cited the case of **Mary Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR** where the Court held:

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

8. The Appellant submitted that in order to arrive at a determination of a fair or an unfair termination, the reason(s) for the termination, and the procedure adopted in effecting the termination are paramount. It was submitted that sections 43, 45(2) and 47(5) of the Employment Act, 2007, places the burden of proof of the reasons for termination on the employer and that section 43 provides that where an employer fails to prove reasons for termination, the termination shall be deemed unfair. The Appellant submitted that under section 45 of the Employment Act, the employer

must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure as under section 41 of the Employment Act. This position was affirmed in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. The Appellant submits that the Respondent did not prove the reason(s) for termination of the Appellant from employment as required under the Employment Act, 2007. The Appellant submits that his testimony remained uncontroverted.

9. The Appellant cited the cases of **Muthaiga Country Club v KUDHEIHA Workers [2017] eKLR** and **Mary Chemweno Kiptui v Pipeline Company Limited [2014] eKLR** where the court held that;

“..the duty rests upon an employer to prove the reason or reasons for the termination and failure to

do so such termination shall be deemed to have been unfair.”

10. The Appellant submitted that the Respondent did not prove the reason(s) for the termination of the Appellant from employment. There was no evidence to the effect that the reason for termination were valid and or fair. The Appellant proved on a balance of probabilities that his termination was unfair as he was not given any reason(s) or valid reason(s) by the Respondent. The Appellant submits that the Trial Court failed to determine if the Respondent terminated the Appellant fairly.

Respondent's submissions

11. The Respondent submits that this being a first appeal, this Honourable Court has opportunity to re-look the evidence and arrive at its own findings, taking into account the fact that it did not have the benefit of observing the demeanour of the witnesses who testified before the Trial Court.

12. The Respondent submitted that to successfully fault a trial court an Appellant must demonstrate that findings of facts arrived at by a trial court are not supported by evidence or are founded on a misapprehension of the evidence. The Respondent submits an appellant will also succeed if they can demonstrate that the judicial officer demonstrably acted on wrong principles in reaching the findings they arrived at. A finding must be plainly wrong for an appellate court to differ. The Respondent submits that no grounds exist for the reversal of the findings made in the Trial Court. The Respondent submitted that having also failed to prove that he was terminated and that unfairly, the Appellant is not entitled to one month salary in lieu of notice. The Respondent thus urged the dismissal of the Appeal with costs.

Disposition

13. The Appellant herein lost his case against his erstwhile employer. He asserts the Learned Magistrate relied on WhatsApp messages which were not ascertained to have come from him. In the decision, when the Learned Magistrate

was dealing with the issue of the messages, the Court stated thus:

The said burden is discharged once the employee establishes a prima facie case that the termination of employment did not fall within the four corners of lawful and fair termination of employment legal threshold set out under section 45(2) of the Employment Act namely: (i) related to the employee's conduct (1), capacity or compatibility (2); or (ii) based on the operational requirements of the employer (3); and (c) that the employment was terminated by fair procedure (4). The Claimant stated that Haria Kalpesh called him on 1st April and asked him to report to work, an allegation disputed by the Respondent. The burden of proving this call lies with the Claimant, the same remains unsubstantiated. Although the court takes note of the difficulty in proving a phone call, the Respondent has gone ahead to rely on WhatsApp extracts to disprove this allegation. While use of these extracts was challenged by the Claimant as not being

accompanied by a certificate of electronic evidence as required under section 106B of the Evidence Act, it is notable that the Claimant responded during cross-examination to the extracts. On page 2 of the extracts, the Claimant is seen to admit that he was not fired when he tells Haria that "My place is still available and you did not fire me, I left myself." This information was also brought out during cross-examination when the same was not disputed by the Claimant. The Claimant further admits to having been absent from work on several instances and attributes this to illness, which he specified to be food poisoning. However, the Claimant did not prove, using treatment notes, the lengthy period of his absence from work due to the said illness. I find that their claim of unfair termination has not been proven. This finding thus dispenses the employer's burden of proof stipulated under sections 43, 45(2) and 47(5) of the Employment Act.

14. The above clearly shows the Learned Magistrate was cognisant of the probative value, or lack thereof, in the WhatsApp messages. He instead leaned on the responses by the Appellant which tended to suggest the factual situation was different from the position the Appellant had taken, including his disavowal of the WhatsApp messages from a telephone number given in court as 0735216000 said to belong to the Appellant.

15. The Trial Court having weighed the factors to consider in determining a wrongful dismissal and the careful analysis of the evidence leaves this Court on Appeal with no doubt that the Learned Magistrate made the correct decision. He evaluated the evidence and even gave due allowance for the electronic conundrum that is the WhatsApp messaging said to have emanated from the Appellant. The messaging suggested rather strongly that the Appellant left the Respondent on his own volition, something the Appellant somewhat confirmed in the answers he gave before the Trial Court.

16. The foregoing is ample that the appeal herein lacks merit and is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Kisii this 8th day of December

2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

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