REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E136 OF 2025

PETER JOHN KELI………..…………….……………...APPELLANT

-VERSUS

SHORE TO SHORE LOGISTICS LIMITED..1ST RESPONDENT

MARTAH WANJIRU NJERI………...2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. T. M. Orlando (PM) delivered on 15th April 2025 in Nairobi MCELRC E1860 of 2022)

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. T. M. Orlando (PM) delivered on 15th April 2025 in Nairobi MCELRC E1860 of 2022 between the parties filed a Memorandum of Appeal dated the 25th April 2025 seeking the following orders: -

   a) This appeal be allowed.

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(b)The Judgment of Hon. Tom Mark Orlando (PM) in MCELRC Case No. E1860 of2022- Peter John Keli - versus- Shore to Shore Logistics & Martha Wanjiru Njeri be reversed and/or set aside and be substituted with Orders for:

i. An order declaring the Appellant's employment was unfairly and unlawfully terminated

ii. An order that the Respondents pay the Appellant one-month salary in lieu of notice in the sum of Kshs. 21,162/-

iii. An order that the Respondent pay the Claimant 12 months' salary in the total sum of Kshs. 252,944/- for unfair and unlawful termination of employment.

iv. Costs and interest of the suit

v. Any other reliefs as the court may deem fit to grant.

(c) Costs of this Appeal together with interest be awarded to the Appellant as against the Respondents.

<u>GROUNDS OF THE APPEAL</u>

2. The Honourable Magistrate erred in law and fact in holding that the Claimant did not prove that his employment was unlawfully and unfairly terminated and in so doing:

a) Disregarded the evidence tendered by the Claimant in form of a message from the 2nd Respondent to the claimant expressly stating "Peter usikuje kazi tena, nitakupigia after two months" which is reasonably construed to mean "Peter, do not come to work anymore, I will call you after two months".

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b) Disregarded the fact that burden of proof shifted to the Respondent to prove that the message by the 2nd Respondent to the Claimant; “Peter usikuje kazi tena, nitakupigia after two months" did not amount to termination of the Appellant/Claimant's employment.

c) In any event and without prejudice to the foregoing, if the learned magistrate was to make a finding that the 2nd Respondent's message did not amount to termination, it ought to recognize that the said message to the Appellant/Claimant was ambiguous and as such ought be construed against the 2nd Respondent in accordance with the contra proferentem rule.

3. The Honourable Magistrate erred in law and in fact in holding that the Claimant constructively resigned from work and in so doing:

a) Failed to keenly evaluate the manifest and intended meaning of the 2nd Respondent's message to the Appellant/Claimant expressly stating “Peter usikuje kazi tena, nitakupigia after two months".

b) Disregarded the fact that the Respondents did not discharge the burden of proof that the subject message did not amount to termination of the Appellant/Claimant's employment.

c) Disregarded the fact that following issuance of the message on 16th August 2022 to the Claimant, the Respondents stopped paying the Claimant's salary.

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d) Disregarded the fact that the 2nd Respondent did not tender any evidence in court confirming that it called the Appellant/Claimant back to work after the two months had lapsed.

4. The Honourable Magistrate while making a finding that the Claimant constructively resigned by issuing the demand letter to the Respondent disregarded the fact that the Respondents did not respond to the Appellant/Claimant's demand letter clarifying to the Claimant that it had in fact not terminated Claimant's employment.

5. The Honourable Magistrate erred in law and fact in holding that the Claimant voluntarily refused to go back to work after 60 days. In making this finding the learned magistrate:

a) Disregarded the fact that the burden of proof shifted to the Respondent to prove that the message by the 2nd Respondent to the Claimant; "Peter usikuje kazi tena, nitakupigia after two months" did not amount to termination of the Appellant/Claimant's employment.

b) Disregarded the fact that the 2nd Respondent did not tender any evidence in court confirming that it called the Appellant/Claimant to work after the two months had lapsed.

c) Disregarded the fact that the 2nd Respondent did not tender any evidence either in the form of a warning letter, notice to show cause and/or notice of termination issued to the claimant if at all the Claimant voluntarily refused to go back to work.

d) Disregarded the provisions of Section 74 of Employment Act which mandatorily requires the employer to keep employee records including any letters issued to its employees.

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e) Disregarded the fact that the Respondents did not respond to the Appellant/Claimant's demand letter clarifying to the claimant that it had not terminated his employment.

6. Without prejudice, the Honourable Magistrate erred in law and fact in holding that the evidence tendered by the Claimant to support the claim that his employment was unfairly terminated was not corroborated and in so doing failed to appreciate that the issues pleaded in (1), (2), (3) and (4) cumulatively amount to circumstantial evidence that leads to a conclusion that the Claimant's employment was unfairly and unlawfully terminated.

7. Having failed to appreciate and/or take into account the issues pleaded in (1), (2), (3), and (4) above, the Honourable Magistrate erred in fact and in law in making a finding that the Claimant's employment was not unfairly terminated.

BACKGROUND TO THE APPEAL

8. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 26th of October 2022 seeking the following orders: -

a) A declaration that the Claimant's employment was unfairly and unlawfully terminated

b) Judgment be entered against the Respondents with an order that the Respondents pay the Claimant the following:

i. One month’s salary in lieu of notice	Kshs. 21,162.00
ii. 12 (twelve) months’ salary for unfair termination of employment	Kshs. 253,944.00
iii. Leave pay for period worked being 6 years	Kshs. 102,554.00
Total	Kshs.377,660.00

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e) Costs of this suit.

f) Any other relief this Honourable court may deem fit and just to grant.

(pages 9-12 of Appellant's ROA dated 16th June 2025).

1. The Claimant filed his list of witnesses dated 26th October 2022; witness statement of even date; and list of documents of even date with the bundle of documents attached (see pages 15-27 of ROA).

2. The claim was opposed by the Respondents who entered appearance and filed a joint statement of response dated 24th July 2023 (pages 33-34, and 39-42 of ROA). They also filed a witness statement of MARTHA WANJIRU NJERI, the 2nd Respondent; and a list of witnesses dated 3rd August 2023 (pages 43-46 of ROA).

3. To counter the Respondents' statement of response, the Claimant/Appellant filed a reply dated 22nd August 2023 (pages 47-50 of ROA). He also filed a further witness statement and a further list of documents, both of even date; and a (pages 51-61 of ROA).

4. The Claimant/Appellant's case was heard on the 6th of February 2024 where the claimant testified in the case, relied on his filed witness statement and further witness statement as his evidence in chief, produced his documents as exhibits, and was cross-examined by counsel for the Respondents Mr. Chebon (pages 146-147 of ROA).

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5. The Respondents' case was heard on the same day with the Respondents calling one (1) witness, the 2nd Respondent, to testify on their behalf. She relied on her filed witness statement as her evidence in chief. She was cross-examined by counsel for the claimant Ms. Soi (pages 147-148 of ROA).

6. The parties took directions on filing of written submissions after the hearing, and complied.

7. The Trial Magistrate Court delivered its judgment on the 15th of April 2025, dismissing the Appellant's claim in its entirety, with an order that each party bears their own costs (judgment at pages 142-144 of Appellant's ROA).

DETERMINATION

8. The appeal was canvassed by way of written submissions. Both parties ccomplied.

Issues for determination

9. In his submissions dated 16th September 2025, the Appellant identified the following issues for determination:

   i. Whether the learned magistrate erred in law and fact in holding that the Claimant did not prove that his employment was unlawfully and unfairly terminated.

   ii. Whether the learned magistrate erred in law and in fact in holding that the Claimant constructively resigned from work & refused to go back to work after 60 days.

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iii. Whether the learned magistrate erred in law and fact in holding that the evidence tendered by the Claimant to support the claim that his employment was unfairly terminated was not corroborated.

iv. Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.

10. The Respondent identified the following issues for determination in their submissions dated 1st October 2025:

    i. Whether the learned Magistrate erred in law and in fact in holding that the Appellant/Claimant had failed to prove, on a balance of probabilities, that his employment was unlawfully and unfairly terminated.

    ii. Whether the learned Magistrate erred in law and in fact in finding that the Appellant/Claimant had constructively resigned from his employment by voluntarily refusing to resume work after the lapse of 60 days.

    iii. Whether the learned Magistrate erred in law and in fact in concluding that the evidence adduced by the Appellant/Claimant was not corroborated.

11. The court on perusal of the grounds of appeal, finds the issue for determination in the appeal were-

a) Whether the trial court erred in finding the appellant constructively resigned from employment.

b) Whether the appellant was entitled to the relief sought in the claim.

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Whether the trial court erred in finding the appellant constructively resigned from employment.

Appellant's submissions

12. The Appellant humbly submits that the learned magistrate erred in law and in fact in holding that the Appellant did not prove that his employment was unlawfully and unfairly terminated and in so doing the following cumulative facts: (a) Disregarded the evidence tendered by the Appellant in form of a message from the 2nd Respondent to the claimant expressly stating "Peter usikuje kazi tena, nitakupigia after two months" which is reasonably construed to mean "Peter, do not come to work anymore, I will call you after two months". (Refer to the text message at page 25 & 59 of the Record of appeal produced as part of the Claimant's Bundle of documents). (b) The learned magistrate also failed to take into account that following this message, the Appellants salary was halted. There was no evidence produced by the Respondents at the trial court to the contrary. (c) The Respondents never called the Appellant back to work after the two months and there was no evidence produced by the Respondents to the contrary. Other than the Respondents statement, there was no evidence whatsoever either in the form of a text message, a letter or otherwise that the Respondent asked the Claimant to go back to work. (d) Disregarded the fact that burden of proof shifted to the Respondent to prove that the message by the 2nd Respondent to the Claimant; "Peter usikuje kazi tena, nitakupigia after two months" did not amount to termination of the Appellant/Claimant's employment. Such evidence would be in the form of any other communication i.e a letter or message informing the Appellant that his employment had not been terminated and or asking him to go back to work at the lapse of two months; or proof that the Respondents continued paying the Appellant salary following that message. It is noteworthy that even after issuance

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of the Demand letter by the Appellant to the Respondents, the Respondents' failed to respond/clarify to the Appellant that in fact his employment had not been terminated. (Refer to the Demand at page 26 of the Record of Appeal).A keen look at the Respondent's statement of response discloses an attempt by the Respondent to disguise the said message as a formal communication purporting to send the Appellant on a "…two months period leave to enable the company conduct investigations into his unbecoming conduct." This is clearly an afterthought as nothing could have been easier than clarifying that in the said message or even after the Appellant issued a Demand letter. (Refer to paragraph 7 of the 2nd Respondent's statement at page 44 of the Record of Appeal). In any event, and if the court were to take the Respondents' claims as true, then other questions would emerge being: where was the formal communication informing the Appellant that he was suspended to enable investigation into his conduct? Was the Appellant ever called in for hearing regarding the alleged investigations into his conduct; what was the report of the alleged investigation? The answer to these questions are all to the negative. It is the Appellant's submission that on consideration of the above facts, he had proved on a balance of probabilities that indeed his employment had been terminated. It therefore fell on the Respondents to disprove this fact but they failed to do so. The Appellant presented prima facie evidence that he was instructed not to report to work and his salary was discontinued. This triggered the evidentiary burden on the Respondents to justify their actions. Their failure to tender any documentation left the Court with no material upon which to assess justification. The burden under Sections 43, 47(5), and 74 remained entirely undischarged. The words used, "usikuje kazi tena", together with halting of the Appellant's salary, were unequivocal and conveyed a clear intent to sever the employment relationship. We place reliance in the case of Joseph Aleper & Another v Lodwar Water and Sanitation Co. Ltd

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[2015] eKLR, where the court found that stoppage of salary and exclusion from the workplace amount to termination. The present case falls squarely within this reasoning: the Appellant was barred from reporting to work, and his salary was stopped, leaving no doubt that the employment relationship was severed. The Employment Act prescribes a two-pronged test for lawful termination: (a) Substantive fairness under Sections 43 and 45, requiring the employer to prove a valid reason for termination; and (b) Procedural fairness under Section 41, which mandates a fair hearing before dismissal. This procedural safeguard is not discretionary it is a statutory imperative. The Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR was unequivocal: "Section 41 is couched in mandatory terms; an employer who fails to hear the employee before dismissal acts unlawfully." The Respondents in this case failed on both fronts. They offered no valid reason, no disciplinary hearing, and no employment records as required under Section 74. Their conduct barring the Appellant from work, halting salary, failing to issue a recall, and neglecting statutory record-keeping amounts to a textbook case of unlawful termination. This legal position is firmly settled in jurisprudence. In Walter Ogal Anuro v Teachers Service Commission [2013] eKLR, the Court emphasized: "The employer bears the burden to demonstrate the reasons for termination and show that the procedure was followed. The Appellant submits that a cumulation of the above facts can only lead to one conclusion that indeed the Appellant's employment was unlawfully and unfairly terminated and we urge this Honorable court to find as much. The trial court's finding to the contrary was a misapplication of the law. It improperly shifted the burden to the Appellant, contrary to the statutory framework and binding precedent. This constituted a serious misdirection in both law and fact, warranting appellate intervention. We invite this Honourable court to be guided by the decision of the

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Court of Appeal in Peter M. Kariuki v Attorney General [2014] eKLR where the court stated as follows regarding the role of the first appellate court that: "We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

13. ISSUE 2: Whether the learned magistrate erred in law and in fact in holding that the Appellant constructively resigned from work and refused to go back to work after sixty days. The Appellant submits that the learned magistrate erred in law and in fact in holding that the Appellant constructively resigned from work by issuing a demand letter and refusing to go back to work after 60 days. On this, the Appellant submits that the learned magistrate erred by failing to keenly and thoroughly evaluate the following facts: (a) Failed to keenly evaluate the manifest and intended meaning of the 2nd Respondent's message to the Appellant/Claimant expressly stating "Peter usikuje kazi tena, nitakupigia after two months". This barred the Appellant from going to work; (b) The Respondents did not call the Appellant back to work after the two months. The Respondents did not tender any evidence in court to the contrary. We urge this Honourable court to note that there was no evidence in whatever form be it a text message, e-mail, letter that they indeed asked the Appellant to go back to work; (c) Disregarded the fact that following issuance of the message on 16th August 2022 to the Claimant, the Respondents stopped paying the Claimant's salary; (d) The only explanation tendered by the Respondent as explanation for the impugned message was that it was as a formal communication purporting to send the Appellant on a "…two months period leave to enable the company conduct investigations into his unbecoming conduct." This is clearly an

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afterthought as nothing could have been easier than clarifying that in the said text message or even after the Appellant issued a Demand letter. The court will further note that there was no report of the purported investigation. (e) The learned magistrate while making a finding that the Claimant constructively resigned and refused to go back to work after 60 days, disregarded the fact that the Respondent did not tender any evidence either in the form of a warning letter, notice to show cause, Notice of termination issued to the claimant if at all the Claimant voluntarily refused to go back to work as alleged; The learned magistrate while making a finding that the Claimant constructively resigned by issuing the Demand letter to the Respondent disregarded the fact that the Respondents did not respond to the Appellant/Claimant's demand letter clarifying to the Claimant that it had in fact not terminated Claimant's employment. It is our submission that these are fundamental facts which the Learned Magistrate should have taken into consideration in deciding the case before him. The learned magistrates finding that the Appellant constructively resigned is not only factually flawed but also a failure by the trial court to hold the Respondents accountable for their ambiguous communication that prejudiced the Appellant's rights. Throughout the Employment Act and particularly Section 74, an employer has a responsibility to make clear communication to its employees and keep proper records of the said communication and produce the same in court if needed. we invite this Honourable court to be guided by the decision of the Court of Appeal in Peter M. Kariuki v Attorney General [2014] eKLR where the court stated as follows regarding the role of the first appellate court that: "We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

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Further that the court be guided by the decision in Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) affirmed the decision of the court in Selle & another v Associated Motor Boat Co. Ltd.& others and in Peters v Sunday Post Limited where it was stated that: "A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

Respondent's submissions

14. The 1st & 2nd Respondents submit that the learned Magistrate was accurate in finding that the Appellant/Claimant failed to prove that his employment was unlawfully and unfairly terminated on a balance of probabilities and in line with Section 107(2) of the Evidence Act (Cap 80 of Laws of Kenya). The 1st & 2nd Respondents firmly submit that the Appellant failed to discharge its burden of proof under Section 47(5) of the Employment Act (2007) therefore, the burden did not at any time shift to the Respondents to justify the termination of employment pursuant to Section 43 of the Act. The 1st and 2nd Respondents rely on the matter of John Karanja Mbogo v Leah Wangui Mburu t/a Gilgil Distributors Limited [2020] KEELRC 612 (KLR), the Court held the following with regard to the discharge and shift of burden of proof: - "… with regard to termination of employment, section 47(5) of the Act places the burden to prove unfair termination of employment upon the employee and the burden to justify the termination of employment on the employer pursuant to section 43 of the Act. The employee must therefore adduce prima facie evidence that tends to show that his

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employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the employee presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed.'' It was the duty of the Appellant to prove his case on a balance of probabilities, as whosoever 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! Further, the trial Court, having carefully considered the material before it, correctly held that the evidence tendered by the Appellant was uncorroborated and unreliable, thereby falling short of establishing the prima facie case contemplated under Section 47(5), and consequently, the evidentiary burden never shifted to the Respondents. That to hold otherwise would be to lower the evidentiary bar to the point where mere allegation is deemed sufficient, contrary to Section 107 of the Evidence Act and the intention of the statute as embodied in Section 47(5) of the Employment Act (2007). Moreover, the Appellant pleads the contra proferentum rule in the interpretation of the Text Message produced as evidence, however, the Respondents herein vehemently deny this application of the rule, guided by Justice Ndolo in dismissing the strict application of the rule in the case of Eunice Kamau –v- AAR Insurance (K) Limited [2017] eKLR stated that: - "Radido J in Mwangi v Kenya Institute of Management [2012] eKLR…. I do not think, however, that this rule provides an escape from the real intention of the parties. Indeed, as held in The National Bank of Commerce Ltd v Nabro Ltd & Anor [2008] eKLR 1 EA 432, the contra proferentum rule is only applicable in cases of ambiguity or where other rules of construction have failed."The text message in question cannot be interpreted in favour of the Appellant, as its terms were clear and unambiguous, and since other established rules of

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construction have not failed, the contra proferentum rule cannot properly be invoked to distort the plain and evident intention of the parties as conveyed by the words used. Notably, the result of such construction is that the message cannot reasonably be construed as an unequivocal termination of employment. That the 1st & 2nd Respondent herein asserts that the learned Magistrate correctly held that the Appellant had constructively resigned from his employment by voluntarily failing to resume work after the lapse of 60 days. The Respondents point out that the Appellant expressly admitted in his testimony that the text message was sent on 16th August 2022 at 11:38 a.m., when he was already absent from work despite his reporting time being 8:00 a.m. from Monday to Saturday. Thus, his unexplained absence amounted to a dereliction of duty and was a clear demonstration of gross misconduct, reinforcing the Respondents' assertion that the Appellant's conduct was inconsistent with the obligations of his employment. The text message sent to the Appellant, in Swahili, was as follows:- "Peter usikuje kazi tena. Nitakupigia after two months"– which translates to mean that Peter should not report to work until she (2nd Respondent) calls him after two months. The suspension from work was, therefore, temporary and not a permanent severance of employment, for the purpose of conducting an investigation into the gross misconduct and poor performance on the part of the Appellant, then get back to him with the next course of action in two months. According to the Blacks' Law Dictionary 9th Edition (Garner, Bryan A) at page 1584 defines the "suspension from employment" as: - 'The temporary withdrawal from employment, as distinguished from permanent severance' That the Courts have previously dealt with similar circumstances and affirmed that an employee may be placed on temporary suspension, subject to recall for further disciplinary action or other administrative procedures. This position was clearly articulated in Mary Chemweno Kiptui v Kenya Pipeline

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Company Limited (2014) eKLR, where the Court stated: –37. A suspension, therefore, is ultimately a right due to an employer who on reasonable grounds, suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control, as the employee can be summoned back to work at any time to undertake disciplinary proceedings or upon terms and given by an employer." However, as the learned Magistrate correctly observed in the judgment, the Appellant admitted in his testimony that the 2nd Respondent informed him she would call him after two months, yet he nonetheless instructed an Advocate who issued a demand letter on 16th September 2022, well before the lapse of the two-month suspension period. The trial Court further observed that the Appellant neither denied nor adduced any evidence to dispute that the 2nd Respondent did in fact call him to resume duty after the two-month period, and, moreover, he failed to present himself back to work at the end of that period. Therefore, the 1st & 2nd Respondent jointly aver that the learned Magistrate was well within the law in holding that the actions of the Appellant, i.e. the premature issuance of the Demand Letter and subsequent non-appearance at work after two months, despite being recalled, amounted to constructive resignation rather than unfair termination of employment. The law is clear that bare allegations, without documents or consistent testimony to back them up, cannot meet the standard of proof required to establish unfair termination on a balance of probabilities. Since the Appellant failed to provide such supporting evidence, the trial Court was fully justified in treating his testimony as weak and unreliable. Section 107 of the Evidence Act makes it clear that the party who alleges must

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prove, and to decide otherwise would wrongly reduce the standard of proof to a level where mere claims are treated as facts.

Decision

9. The grounds of appeal were –

a. The Honourable Magistrate erred in law and fact in holding that the Claimant did not prove that his employment was unlawfully and unfairly terminated and in so doing:

b. Disregarded the evidence tendered by the Claimant in form of a message from the 2nd Respondent to the claimant expressly stating "Peter usikuje kazi tena, nitakupigia after two months" which is reasonably construed to mean “Peter, do not come to work anymore, I will call you after two months".

c. Disregarded the fact that burden of proof shifted to the Respondent to prove that the message by the 2nd Respondent to the Claimant; “Peter usikuje kazi tena, nitakupigia after two months" did not amount to termination of the Appellant/Claimant's employment.

d. In any event and without prejudice to the foregoing, if the learned magistrate was to make a finding that the 2nd Respondent's message did not amount to termination, it ought to recognize that the said message to the Appellant/Claimant was ambiguous and as such ought be construed against the 2nd Respondent in accordance with the contra proferentem rule.

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e. The Honourable Magistrate erred in law and in fact in holding that the Claimant constructively resigned from work and in so doing:

f. Failed to keenly evaluate the manifest and intended meaning of the 2nd Respondent's message to the Appellant/Claimant expressly stating "Peter usikuje kazi tena, nitakupigia after two months".

g. Disregarded the fact that the Respondents did not discharge the burden of proof that the subject message did not amount to termination of the Appellant/Claimant's employment.

h. Disregarded the fact that following issuance of the message on 16th August 2022 to the Claimant, the Respondents stopped paying the Claimant's salary.

g. Disregarded the fact that the 2nd Respondent did not tender any evidence in court confirming that it called the Appellant/Claimant back to work after the two months had lapsed.

h. he Honourable Magistrate while making a finding that the Claimant constructively resigned by issuing the demand letter to the Respondent disregarded the fact that the Respondents did not respond to the Appellant/Claimant's demand letter clarifying to the Claimant that it had in fact not terminated Claimant's employment.

i. The Honourable Magistrate erred in law and fact in holding that the Claimant voluntarily refused to go back to work after 60 days. In making this finding the learned magistrate:

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j. Disregarded the fact that the burden of proof shifted to the Respondent to prove that the message by the 2nd Respondent to the Claimant; "Peter usikuje kazi tena, nitakupigia after two months" did not amount to termination of the Appellant/Claimant's employment.

k. Disregarded the fact that the 2nd Respondent did not tender any evidence in court confirming that it called the Appellant/Claimant to work after the two months had lapsed.

l. Disregarded the fact that the 2nd Respondent did not tender any evidence either in the form of a warning letter, notice to show cause and/or notice of termination issued to the claimant if at all the Claimant voluntarily refused to go back to work.

m. Disregarded the provisions of Section 74 of Employment Act which mandatorily requires the employer to keep employee records including any letters issued to its employees.

n. Disregarded the fact that the Respondents did not respond to the Appellant/Claimant's demand letter clarifying to the claimant that it had not terminated his employment.

o. Without prejudice, the Honourable Magistrate erred in law and fact in holding that the evidence tendered by the Claimant to support the claim that his employment was unfairly terminated was not corroborated and in so doing failed to appreciate that the issues pleaded in (1), (2), (3) and (4) cumulatively amount to circumstantial evidence that leads to a conclusion that the Claimant's employment was unfairly and unlawfully terminated.

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p. Having failed to appreciate and/or take into account the issues pleaded in (1), (2), (3), and (4) above, the Honourable Magistrate erred in fact and in law in making a finding that the Claimant's employment was not unfairly terminated.

10. The genesis of the cause of action was the text message by the respondent to wit – ‘’Peter usikuje kazi tena, nitakupigia after two months" the trial court held-‘*In this case the claimant testified that he received a text massage telling him not to report to work he admitted that the massage was sent at 11.38 and he had not reported to work yet he was to report to work at 8.00. am. Further the claimant testified that the respondent promised to call him after two months yet he went to an advocate and issued a dement letter before the expiry of the two months.The respondent's witness testified that the complainant voluntarily refused to go back to work when he was called to go back to work after the two months. The claimant did not deny that he was called to go back to work after two months. From the evidence, I find that the claimant did not prove that he was terminated, the claimant constructively resigned from employment by issuing a demand letter to the employer and by refusing to go back to work after the 60 days. As stated in the case of Liz Anyango vs Leisure Lodge limited [2018]eKLRIt was the duty of the claimant in this case to prove his case on a balance of probabilities. Section 107 of the Evidence Act Cap 80 Laws of Kenya is clear on this point; the said section provides that 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. section 107 (2) provides that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. I find it hard to believe the claimant's evidence that he was terminated. The only conclusion I can arrive at is that the claimant constructively*

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resigned from his employment by issuing a demand letter to the respondent. As it stands I find it hard to believe the evidence of the claimant which was not corroborated.''

11. The said text message was produced and admitted as evidence of the appellant. It was sent by Martha Boss (RW1) on 16th august 2022 at11.38 and stated- ' *Peter Usikuje Kazi tena. Nitakupigia after two months.* '' On literal interpretation the court finds that sentence 'Peter Usikuje Kazi tena.' was complete and the literal translation in English is- 'Peter do not come to work again''. Further the text stated Martha will call the appellant after two months. The appellant submits that the text meant he was terminated, and this was compounded by the failure of the respondent to pay his salary thereafter. During cross-examination, the appellant admitted the text was sent at 11.48am, and he had not reported to work as required at 8.00a.m. he admitted having instructed the lawyer who sent a demand letter before the expiry of the 60 days.

12. Conversely the respondent called the said Martha as witness who admitted to have sent the text. She told the court the text message was for the appellant to come back after 2 months. That he had failed to report to work, hence the text to come back to work after 60 days. The witness told the trial court she called the appellant to come back to work but came with a demand letter. On re-examination the witness said she issued verbal warning and called the appellant for disciplinary but failed to do so alleging the appellant was illiterate. RW1 relied on her witness statement dated 2nd August 2023. She stated the appellant was not diligent at work for absconding, stealing, threats of witchcraft and insubordination. That due to the foregoing, he was asked to take a two-month leave to enable the respondent to conduct an investigation.

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That the employment was not terminated and was subject of a disciplinary hearing. The court concluded that, while it is true the appellant admitted he had not reported to work when the text message was sent, the message was tantamount to termination of employment, as it asked the appellant not to report to work again. The respondent barred the appellant from reporting to work and did not pay salary thereafter, which are grounds of finding constructive dismissal on the basis of material repudiation of the contract (Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)). The case was not of contractive dismissal but unfair termination vide express words of '*Peter Usikuje Kazi tena''*. On the interpretation of the text message the respondent submitted that in The National Bank of Commerce Ltd v Nabro Ltd & Anor [2008] eKLR 1 EA 432, the contra proferentum rule is only applicable in cases of ambiguity or where other rules of construction have failed." The respondent asserted that the text message in question cannot be interpreted in favour of the Appellant, as its terms were clear and unambiguous, and since other established rules of construction have not failed, the contra proferentum rule cannot properly be invoked to distort the plain and evident intention of the parties as conveyed by the words used. The court finds that whenever there is ambiguity in any document drawn by the employer, the doctrine of contra proferentum rule is invoked to interpret the document in favour of the employee. the text message was clear he was not to return to work again. However, there was a statement he would be called after 2 months, but it was not stated why he would be called. Taking into account that no salary was paid thereafter, the court agreed with the appellant that the text message amounted to unfair termination of employment, as no reason was stated for the termination, nor was there a hearing on the alleged allegations of absconding, stealing, witchcraft, and insubordination. The alleged call for a disciplinary hearing was not proved

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before the trial court. 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). The court found the trial court erred in fact and law in failing to find that the text message asking the appellant not to report to work again and consequent non-payment of salary amounted to unfair termination. Even on receipt of the demand letter, the respondent did not reply to explain the alleged reason for stating they would call after 60 days. The alleged call for disciplinary proceedings was not proved. The court finds that the appellant proved on balance of probabilities that his employment was terminated unfairly vide said text message by Martha from the employer that –‘Peter Usikuje Kazi tena. Nitakupigia after two months. ’On appeal, the court held the termination was unfair for lack of valid reasons and procedural fairness.

Whether the appellant was entitled to relief sought

13. The appellant has sought the following relief on appeal -

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i. An order declaring the Appellant's employment was unfairly and unlawfully terminated

ii. An order that the Respondents pay the Appellant one-month salary in lieu of notice in the sum of Kshs. 21,162/-

iii. An order that the Respondent pay the Claimant 12 months' salary in the total sum of Kshs. 252,944/- for unfair and unlawful termination of employment.

iv. Costs and interest of the suit

v. Any other reliefs as the court may deem fit to grant.

14. The court held the termination was unfair for lack of valid reason and lack of procedural fairness. According to section 50 of the Employment Act, the court, on finding unfair termination, is to consider awarding any or all of the remedies under section 49(1) of the Employment Act taking into account factors under subsection 4. The appellant was entitled to notice pay under section 35 of the Employment Act, which is granted for 1 month's salary, Kshs. 21,162.(The respondent admitted the salary paid under witness statement of Martha(page 43 of ROA). The appellant was employed on 16th August 2016 and services terminated on the 16th August 2022. He was allegedly accused of many issues during employment but no iota of evidence was placed before the court. The court, taking into account the period of service (August 2016 - August 2022) and the unfair termination based on unsubstantiated allegations , awards the appellant an equivalent of 8 months gross salary compensation Kshs. 21,162 x8 months for the sum of Kshs. 169,296 plus 1 month notice Kshs. 21,162.

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Conclusion

15. The appeal is allowed. The Judgment and Decree of the Hon. T. M. Orlando (PM) delivered on 15th April 2025 in Nairobi MCELRC E1860 of 2022 is set aside and substituted as follows-

Judgment is entered for the claimant against the respondent as follows-

i. **An order declaring the Appellant's employment was unfairly and unlawfully terminated.**

ii. **An order that the Respondents pay the Appellant one-month salary in lieu of notice in the sum of Kshs. 21,162/-.**

iii. **An order that the Respondent pay the Claimant 8 months' salary compensation in the total sum of Kshs. 169,296 for unfair and unlawful termination of employment.**

iv. **Costs and interest of the suit from the judgment date.**

The appellant is awarded costs of the appeal

16. **Stay of 30 days granted.**

17. **It is so Ordered.**

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

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IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ms. Soi

Respondent- Pamba h/b Mr. Chebon

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