



**Kiprotich v Twyford Ceramics Company Limited & another (Appeal E160 of 2023) [2025] KEELRC 3501 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E160 OF 2023  
NJ ABUODHA, J  
DECEMBER 5, 2025**

**BETWEEN**

**COLLINS KIPROTICH ..... APPELLANT**

**AND**

**TWYFORD CERAMICS COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KEDA (KENYA) CERAMICS COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the decision and Judgment of Honourable V.A KACHUODHO(PM) delivered at Kajiado Chief Magistrates Employment and Labour Relations Court cause No. E087 of 2021 on 31<sup>st</sup> July, 2023.)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 31<sup>st</sup> August, 2023 the Appellant appeals against the whole of the Judgment of Honourable V.A K'achuodho delivered on 31<sup>st</sup> July, 2023.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in fact and in law in finding that the Appellant voluntarily resigned from his position of employment with the Respondent despite overwhelming evidence to the contrary.
  - ii. The Learned Magistrate erred in fact and in law in finding that the Respondent had reasonable cause to institute disciplinary proceedings against the Appellant against the thrust and indeed in ignorance of the Appellant's evidence to the contrary.
  - iii. The Learned Magistrate erred in fact and in law in finding that the Appellant failed to discharge his burden of proof under section 47(5) of the *Employment Act* in spite of ample uncontroverted testimony/evidence of the Appellant to the contrary of that position.



- iv. The Learned Magistrate erred in fact and in law in arriving at an award that was inordinately low that was not in line with the evidence tendered by the Appellant and also in failing to award him costs of the suit.
  - v. The Learned Magistrate erred in arriving at a decision/ determination that was wholly against the weight of the evidence tendered in this matter.
3. The Appellant prayed that the Appeal be allowed and this court sets aside the judgment of Hon. V.A Kachuodho dated 31<sup>st</sup> July, 2023 discharging the Respondents from liability and the awards made and be substituted with a finding that the Appellant was unfairly terminated and he was entitled to the reliefs sought in his claim as supported by his submissions dated 9<sup>th</sup> March, 2023 and authorities relied therein.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Maina, Omore & Mwaura Advocates filed written submissions dated 21<sup>st</sup> July, 2025 and Counsel submitted that the 1<sup>st</sup> Respondent did not enter appearance and defend the suit however the 2<sup>nd</sup> Respondent did enter appearance and filed its response where it alleged that the Appellant was dismissed on gross misconduct. That the 2<sup>nd</sup> Respondent produced a show cause letter dated 6<sup>th</sup> August, 2019 which the Appellant denied signing. The 2<sup>nd</sup> Respondent followed this up with a notice to attend a disciplinary hearing dated 12<sup>th</sup> August, 2019 and letter of summary dismissal dated 19<sup>th</sup> August, 2019.
6. Counsel submitted that both notices were never acknowledged or received by the Appellant as the same were fabrications and falsified to suit their narrative for summary dismissal. That this narrative of summary dismissal changed once counsel was served by the Appellant's counsel with supplementary list of documents dated 20/7/2022 significantly pleading the Claimant's NHIF Member Data summary disclosing various notifications for the Claimant's treatment at Kitengela Medical Services as well as NHIF payments in Claimant's favour effected by the 1<sup>st</sup> Respondent (the 2<sup>nd</sup> Respondent predecessor).
7. Counsel submitted that this corroborated the Appellant's treatment notes pleaded in the initial list of documents dated 2<sup>nd</sup> November, 2021 and the assertion that he was constrained to seek medical treatment for the injury and chronic work-related injury which obliterates the 2<sup>nd</sup> Respondent allegation that the Claimant was guilty of persistent absenteeism without plausible reason.
8. Counsel further submitted that the Appellant in its supplementary list of documents the Claimant produced a resignation form evidently prepared by the 2<sup>nd</sup> Respondent as opposed to be authored by the Appellant out of his own will. That the Appellant resisted to sign the resignation form under extreme duress by the 2<sup>nd</sup> Respondent and managed to leave with the same from the Respondent's premises. Counsel further submitted that it was upon the Respondent's advocates being served with the said document that they filed a Respondent's witness statement dated 28/10/2022 by one Mary Wangui Kopeyo where the story changed to the effect that it was the Appellant who requested to voluntarily resign but he refused to finalize with the Human Resource Department. That if this was the case why did the Respondent not plead this fact from the 1<sup>st</sup> instance and they were siezed with the Appellant's file as the Human Resource Department.
9. Counsel further submitted that the said witness confirmed in cross-examination that she was not an employee of the Respondent at the capacity of her current designation and she did not know the



- Claimant personally. That she relied on records. That no HR Manual was produced which provided for conduct that constituted gross misconduct warranting summary dismissal.
10. Counsel submitted that the notice of disciplinary hearing as well as the show cause letter the witness alleged, was sent to the Appellant's postal address which was non-existent and in cross examination the witness could not produce any proof of posting the documents hence the same was never received by the Appellant and the purported disciplinary hearing never occurred. That the trial court ignored that important fact.
  11. Counsel submitted that parties were bound by their pleadings and it was not open for the Respondent to plead one set of facts in its response and another set of facts in its evidence and testimony. Counsel relied on among other cases the case of *Mwongela & Another v Angila*(Civil Appeal E694 of 2023) (2024) KEHC 7382(KLR) (CIV) (10 June 2024)(Judgment) on parties being bound by their pleadings.
  12. Counsel urged the court to consider the submissions dated 9<sup>th</sup> March,2023 on the case law and relevant statutes cited therein in this appeal. Counsel prayed that the appeal be allowed with costs of the lower court and this appeal.

### **Respondents' Submissions**

13. The Respondents' Advocates J.A Guserwa & Co. Advocates filed submissions dated 2<sup>nd</sup> October, 2025 and submitted that the Appellant was engaged initially by the Respondent from 2016 to January 2019 when he was dismissed and reengaged for new fixed term contract from 26<sup>th</sup> February, 2019 to 26<sup>th</sup> February, 2020. That the Appellant resigned on 7<sup>th</sup> August, 2019 for personal reasons after he had worked for 5 months 10 days.
14. Counsel relied on section 47(5) of the *Employment Act* on the burden of the Appellant to prove unfair termination occurred. That the Appellant was served with a notice to show cause dated 6<sup>th</sup> August,2019 charging him with absenting himself from work since 26<sup>th</sup> July,2019 and he acknowledged receipt of the same by endorsing his names and appending his signature on the 6<sup>th</sup> August,2019. That he was required to make his response by 9<sup>th</sup> August,2019. That it was not in dispute that the Appellant was absent from work from 26<sup>th</sup> July, 2019 to 5<sup>th</sup> August, 2019 when he resumed work and he was given the show cause letter.
15. Counsel submitted that the Appellant did not have a clean disciplinary record as he had three warning letters of 14<sup>th</sup> March,2019, 27<sup>th</sup> May,2019 and 8<sup>th</sup> June, 2019 on absenteeism hence a habitual absentee without leave. That instead of the Appellant responding to the show cause letter by 9<sup>th</sup> August, 2019 he opted to resign on 7<sup>th</sup> August, 2019 by filing the resignation form and gave the reasons of personal reasons in the form.
16. Counsel submitted that the Appellant in cross-examination confirmed he signed the resignation form. That the Appellant failed to indicate how he was forced to resign and therefore he failed to discharge his burden under section 47(5) of the Act. He did not demonstrate that the alleged termination was unfair.
17. Counsel further submitted that the Appellant under paragraph 8 of the claim indicated that on 5<sup>th</sup> February,2019 he got injured on his right hand and right foot in the course of his duties while in cross-examination he admitted he got injured on his right foot only and not right hand as indicated. That the Appellant in his undated witness statement indicated that he was adversely affected by noxious chemicals while the Appellant's contract under clause 13 which was couched in mandatory terms provided for medical attention.



18. Counsel submitted that as per above clause which provided clinic for injured employees the Appellant during cross-examination admitted that the said clinic was available and he did not report to the same. That there was no evidence that the Appellant reported the alleged incidents to his Head of Department which was mandatory as per above clause. Counsel relied on section 21 of the WIBA on reporting such accident to employer by employee.
19. Counsel submitted that the court should find that the Appellant was never injured since there was no evidence that he reported the same as required under clause 13 and section 21 of WIBA. That the court should dismiss the claims that the Appellant was unwell or injured. That jurisdiction of work injury related claims was exclusive to the DOSH and the court lacked jurisdiction over the same.
20. Counsel submitted that the Appellant was not entitled to 12 months compensation for unfair termination since he voluntarily resigned from employment for personal reasons since he could not have been dismissed by the Respondent since the disciplinary process was incomplete. That the Appellant sought for house allowance yet clause 6.2 of the contract provided that the salary was inclusive of house allowance.
21. Counsel submitted that the Appellant sought for notice of one- month salary yet he resigned and he was not entitled to any notice. That his resignation was to take effect immediately without giving the Respondent any notice hence the Appellant owes the Respondent Kshs 15,000/= as one-month notice pay in lieu of notice as required by clause 10 of the contract of employment.
22. On unpaid performance bonus claimed by the Appellant, counsel submitted that clause 6.1 of the employment contract provided for the same and that due to the Appellant's absenteeism he was not entitled to any performance bonus since the bonus was based on a two-pronged criterion of attendance and performance coefficient.
23. Counsel submitted that the Appellant was not entitled to service pay having resigned without notice. That the Appellant claim for untaken leave days of Kshs. 19,320/= was not justified as the Appellant never justified how the alleged leave days were calculated since he did not attach any pay slips as proof of his allegations. That the Appellant was entitled to leave as per clause 7.1 of the employment contract which provided for 21 days leave after 12 months continuous service yet the Appellant had served for less than the 12 months.
24. On the claim for certificate of service counsel while acknowledging it was the Appellant's right under section 51 of the Employment Act counsel submitted that the Appellant upon resigning he never cleared with the Respondent. That clearance was founded under clause 10 of the employment contract and since the Appellant never produced evidence of exit checklist as required he should clear with the Respondent to get his certificate of service. Counsel prayed the Appeal be dismissed with costs.
25. Counsel relied on the case of Cause 630 of 2019, Timothy Oluoch Deya vs Safaricom Limited, Cause No. 2402 of 2017 Wycliffe Kerote Mulweye v Repelectric(K) Limited and cause No. 1393 of 2010, Robert Indiazzi v Tembo Sacco Limited in support of her submissions that an employee who resigns was not entitled to any of the reliefs sought.

## **Determination**

26. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence before the subordinate court both on points of law and facts and come up with its own findings and conclusions



as was held in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that: -

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

27. In this case, the Judgment of the trial court was a declaration that the claimant failed to discharge the burden of proof under section 47(5) of the *Employment Act* and that the claimant was awarded one-month salary in lieu of notice, terminal dues and certificate of service with each party bearing the costs of the suit. The Appellant being aggrieved by the judgement appealed on the whole of the Judgment raising 5 grounds.
28. The court finds that the grounds will be condensed in to two issues namely: -
  - a. Whether the trial court erred by finding that the Appellant did not discharge his burden of proof under section 47(5) of the *Employment Act*.
  - b. Whether the awards made to the Appellant by the trial court were inordinately low.

**Whether the trial court erred by finding that the Appellant did not discharge his burden of proof under section 47(5) of the *Employment Act***

29. The court notes that the Appellant was employed by the Respondent from 2016 up to early 2019 when he was given a fixed term contract of one year from 26<sup>th</sup> February, 2019 to 26<sup>th</sup> February, 2020. The applicable contract of employment was the one of 26<sup>th</sup> February, 2019. They parties parted ways in August, 2019 before the expiry of the fixed term contract.
30. The respective burden of proof for the parties is as governed by section 47(5) of the *Employment Act* where the Appellant ought to illustrate a termination which was unfair occurred and the Respondent to justify the grounds of the termination. The court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR explained this burden as follows: -
  14. 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.”
  15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.



31. It was upon the Appellant to demonstrate that unfair termination occurred before the Respondent could be called upon to justify the grounds for termination of service. The Appellant alleged that he got injured on 5<sup>th</sup> February, 2019 and he was adversely affected by noxious chemicals. The medical reports from Kitengela Medical services showed he was treated on 9<sup>th</sup> February, 2019 four days after the incident.
32. The court notes that the said period was not even within the period of the new contract entered between the parties on 26<sup>th</sup> February, 2019. The period which led to termination of the Appellant was absenteeism between 26<sup>th</sup> July, 2019 to 5<sup>th</sup> August, 2019 when the Appellant resumed work on 6<sup>th</sup> August, 2019 claiming he was sick. The Appellant never produced any medical records for the said period to show that he was sick. The NHIF data summary shows that the Appellant was admitted on 10<sup>th</sup> August, 2019 to 13<sup>th</sup> August, 2019 shortly after parties parted ways around 7<sup>th</sup> August, 2019. The treatment notes also have a stamp date of 20<sup>th</sup> August, 2019 from the Kajiado Referral Hospital which was again after the cessation of employment contract.
33. In addition, clause 13 of the employment contract provided that the Respondent had an inhouse clinic where a nurse was deployed and any injured employee was to visit the clinic for free consultations. The Appellant confirmed that he did not seek the nurse's help stating he/she was not there with no proof of the same. The Appellant was required to notify the head of department and he stated he notified the translator again with no evidence.
34. This court also notes that the Appellant was issued with a number of warning letters with the third and the final warning letter being one dated 13<sup>th</sup> June, 2019. All warning letters were signed by the Appellant in as much as he denied some of the signatures were not his. The same was not proved by evidence. The Appellant ought to have known that after the three warning letters due to absenteeism any other absenteeism would lead to summary dismissal as provided for under section 44(4)(a) of the *Employment Act*.
35. It was held in the case of Richard Kiplimo Koech Vs Yuko Supermarket Ltd [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the *Employment Act* obtain.
36. The court also noted that the show cause letter dated 6<sup>th</sup> August, 2019 was received by the Appellant who signed the same but he never responded as advised to respond by 9<sup>th</sup> August, 2019. The Appellant has largely denied that he was forced to resign by filing the resignation form of 7<sup>th</sup> August, 2019 but it was never indicated in the form that it was signed under duress.
37. It is therefore clear that the Appellant without proof of factors which vitiate a contract like those of duress, misrepresentation or coercion among others to sign the resignation form he then opted to resign instead of being summarily dismissed as held by the trial court. This court therefore agrees with the trial court's finding that the Appellant did not discharge the burden of proof on his part that termination which was unfair occurred for the Respondent to be called upon to justify the grounds of termination under section 47(5) of the *Employment Act*.

**Whether the awards made to the Appellant by the trial court were inordinately low.**

38. The trial court awarded one-month salary in lieu of notice, terminal dues and certificate of service. This court disagrees with the trial court on the award of notice pay in lieu of notice for the reasons that the Appellant was guilty of gross misconduct warranting summary dismissal and the fact that he resigned without notice to the Respondent. He was the one to pay the Respondent such notice pay in lieu of notice.



39. Concerning terminal dues, the trial court never stipulated which terminal dues since the Appellant was not entitled to any leave having worked less than 12 months as per her contract of employment clause 10, the salary was inclusive of house allowance as per clause 6.2 of the contract hence no house allowance was payable, the Appellant was a member of NSSF and NHIF hence no service pay as per exclusion of section 35(6) of the *Employment Act* and performance bonus which was pegged on attendance and performance efficiency of the Appellant.
40. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;
- “The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.”
41. In the above regard, the court will therefore disturb the awards herein because the trial court misdirected itself in the assessment despite finding that the Appellant did not discharged the burden of proof placed upon it by law. The Court ought to have analysed those terminal dues to see which ones apply whether there was unfair termination or not hence arriving at a wrong decision. In this case the trial court made awards which were not justified as illustrated above hence the issue of whether they were inordinately low or not does not arise.
42. In the upshot the Appeal is found unmerited and is hereby dismissed with each party bearing the costs of the appeal.
43. Save for certificate of service to be issued upon satisfactory clearance, the awards by the trial court to the respondent of one-month salary in lieu of notice and terminal dues are hereby set aside and substituted with an order dismissing the suit with costs to the respondent in the lower court.
44. It is so ordered.

**DATED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025**

**DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

