

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

ELRC APPEAL NUMBER E012 OF 2025

MAS INTIMATES

KENYA (EPZ) LIMITED.....APPELLANT

VERSUS

CAROLINE ADISA OCHIENG.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D.K. Kuto (SPM)
delivered on 6th February 2025 in Mavoko MCELRC Cause No. E006 of 2023)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with Judgment and Decree of the Hon. D.K. Kuto (M) delivered on 6th February 2025 in Mavoko MCELRC Cause No. E006 of 2023 between the parties filed a Memorandum of Appeal dated 4th March 2025 seeking the following orders: -

- a. **This Appeal be allowed.**

- b. The Judgment delivered by the Honourable Derrick K. Kuto (SPM) on 6th February 2025 against the Appellant be set aside, with orders substituted thereof, dismissing the Respondent's suit with costs.**
- c. The Appellant be granted costs of this Appeal and costs in the superior court.**

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GROUND OF THE APPEAL

2. The Honourable Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the pleadings and evidence before it and in arriving at a decision which is not supported by or is manifestly against the weight of the evidence.
3. The Honourable Magistrate erred in law and in fact by disregarding the totality of the Appellant's pleadings, documents and cited authorities and as a result arrived at a decision materially unsupported by the law quite contrary to established jurisprudence.
4. The Honourable Magistrate erred in law and in fact in finding in favour of the Respondent and directing the termination of the Respondent was unfair.
5. The Honourable Magistrate erred in and fact by finding that the Respondent's employment was unfairly terminated yet the Respondent never produced a termination letter or any evidence to substantiate the allegation for unfair termination.

6. The Honourable Magistrate erred in law in finding in favour of the Respondent by disregarding the attendance sheets which showed that the Respondent deserted duty.
7. The Honourable Magistrate erred in and fact by finding that the Respondent's employment was unfairly terminated yet the Respondent never produced a termination letter or any evidence to substantiate the allegation for unfair termination.
8. The Honourable Magistrate erred in law in finding in favour of the Respondent by disregarding the attendance sheets which showed that the Respondent deserted duty.
9. The Honourable Magistrate erred in law and fact by awarding the Respondent unpaid annual leave yet the same was not proven to the required standard.
10. The Honourable Magistrate erred in law and fact by failing to appreciate that the Respondent absconded duty and was not terminated from employment.
11. The Honourable Magistrate erred in law and in fact in awarding the maximum remedy being twelve months' salary to the Respondent and despite acknowledging that the Respondent was engaged in a fixed term contract.
12. The Honourable Magistrate erred in law and fact by extending the Appellant's obligations beyond the fixed term contract as required by law and awarded compensation beyond the period the contract was set to lapse.

13. The Honourable Magistrate erred in law and fact in awarding the maximum remedy, being twelve months' salary to the Respondent yet the Respondent's fixed term contract was set to terminate on 24th September, 2022.

14. The Honourable Magistrate erred in law and fact in directing the Appellant to pay the Respondent one month's salary in lieu of notice together with twelve months'.

BACKGROUND TO THE APPEAL

15. The Respondent filed suit against the Appellant vide a memorandum of claim dated the 29th of January 2023 seeking the following orders: -

- a. A declaration that the Respondent's termination of the Claimant's employment was illegal, unfair and malicious.
- b. A declaration that the actions by the Respondent in terminating the Claimant's employment amounted to unfair labour practice.
- c. The Claimant be paid her terminal dues as set out hereinbelow:

i. 1 month's salary in lieu of notice	Kshs. 23,239.00
ii. Compensation for unfair termination	Kshs.278,868.00
iii. Unpaid annual leave for 2021	Kshs. 9,608.00
Total	Kshs.311,715.46

- d. The Respondent to issue the Claimant with a Certificate of Service under Section 51 of the Employment Act 2007
- e. Costs of this claim and interest thereto from the date of filing of the claim.
- f. Any other award that the court may deem fit.

(pages 2-6 of Appellant's ROA dated 27th June 2025).

- 14. The Respondent filed her verifying affidavit sworn on 29th January 2023, list of witnesses, witness statement, and list of documents with bundle of documents attached, all of even date (pages 7-31 of ROA).
- 15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 27th September 2023 (pages 32-37 of ROA). They also filed a witness statement of one Sylvia Mumbua Makumi dated 2nd July 2024, and a list and bundle of documents dated 27th September 2023 (pages 38-71 of ROA).
- 16. On 9th October 2024, both parties consented to the case proceeding by way of filed documents (page 7 of the typed proceedings under Supplementary ROA dated 1st August 2025). The parties took directions on filing of written submissions and complied.
- 17. The Trial Magistrate Court delivered its judgment on 6th February 2025 allowing the Respondent's claim (judgment at pages 162-170 of ROA).

DETERMINATION

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

Issues for determination

19. In their submissions dated 18th September 2025, the Appellant identified the following issues

for determination: -

- i. Whether the Respondent was unfairly terminated from employment or she absconded duty.
- ii. Whether the trial magistrate erred in fact and law in delivering judgment against the Appellant in favour of the Respondent and awarding the maximum compensation equivalent to thirteen months' salary.
- iii. Whether the Appellant is entitled to the reliefs sought.
- iv. Who bears the costs of the Appeal and at the Trial Court.

20. The Respondent outlined the following issues for determination-

- i. Whether the lower court erred in finding procedural unfairness under Section 41 for non-compliance in absconding cases.
- ii. Whether the court mis appreciated evidence on substantive fairness.
- iii. Whether the awards of 12 months' compensation, notice pay, and annual leave were excessive or unsupported.
- iv. Whether the Appeal warrants interference with the trial court's findings.
- v. Who should bear the costs

21. The court having perused the submissions and grounds of appeal, was of the considered opinion that the issues placed by the parties for determination in the appeal were-
- a. whether the trial court erred in fact and law in finding unfair termination
 - b. whether the trial court erred in fact and law in relief granted.

Whether the trial court erred in fact and law in finding unfair termination

The appellant's submissions

22. The Appellant submits that the Respondent herein absconded duty and was not unfairly terminated from employment. The Respondent's employment contract was set to lapse on 24th September, 2022, and the same was never terminated by the Appellant. In any event, all communications to the employees are done in writing as was in this case. It has been established the Respondent would clock into work by signing on the clock-in sheets. (Refer to pages 26 to 29 of the Respondent's List and Bundle of Documents). However, upon leaving night shift on 1st July, 2022, the Respondent failed to go to report to work on 2nd July, 2022, as evidenced by the clock-in sheets produced by the Appellant in the consideration of the matter. The Appellant reached out to the Respondent vide letter dated 6th July, 2022 and 12th July, 2022 and the same were sent to her postal address, the one she provided to the company as her address. Surprisingly, your Ladyship, the Respondent failed to respond to the aforementioned letters and further failed to reach out to the Appellant to explain her unauthorized absence from work, and no explanation for the same has been given to date. The Respondent accepted to be bound by the terms of the contract and had a duty to be at work and in the event that she was unable to report to work, she was obliged to inform

the Appellant of her whereabouts. We place reliance on the case of Joseph Njoroge Kiama vs. Summer Ltd (2014) eKLR where the Honourable Court stated that: "Generally, the employee has an obligation to inform the employer of any reason why he or she is unable to be at work." Your Ladyship, the Respondent cannot allege to having been terminated unfairly and yet she absconded duty. In any event, had the Respondent experienced any challenge in reporting to work, notifying the Appellant would have sufficed. The Appellant, despite the Respondent's conduct, further reached out to the Respondent vide phone calls which went unanswered before issuance of the letter dated 6th July, 2022. Further, the Respondent having failed to give any explanation for unauthorized absence for eleven days and failing to turn up to work amounted to her vacating her post. In Joseph Njoroge vs. Summer Ltd (supra), the Honourable Court stated that: Absence from work for ten days without permission entitled the Respondent to summarily dismiss the Claimant from work as provided for under Section 44(4) of the Employment Act." also place reliance on the case on Richard Kiplimo Koech versus Yuko Supermarket Limited (2015) eKLR where the Honourable Court stated thus: "Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee...And in my view, it is incumbent upon an employer who alleges that an employee has absconded duty to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the Employment Act." We are guided by the Honourable Court's decision in Leonard Kipkorir Mutai vs. Lichi Security Systems Limited (2020) eKLR where it was stated thus: "Once the employer treats the employees as having absconded it is incumbent upon the employer to seek to know why the employee is absent. The Respondent did the best and as such it cannot be faulted. An employee cannot

default in appearing at work and expect that the employer will deploy additional resources to trace the employee or require him to show cause why his services should not be terminated. Refusal to go to work can be construed as repudiation of contract. In this case the Claimant failed to prove unfair dismissal the suit is only fit for dismissal.” (Emphasis added) The burden of proving unfair termination lies with the Respondent and she is required by law to provide evidence to support her allegations. The Appellant has demonstrated that the Respondent was never terminated from employment as alleged. She deserted duty and repudiated her contract of employment. In the event that the Respondent was truthful about her allegations as contained in the Statement of Claim, she should have produced documents to support her assertions of being unfairly terminated including any letter of termination. Having established above that the Respondent absconded work, she is therefore estopped from claiming unfair termination. The Respondent alleges to having been terminated from employment but has failed to give any proof of the same contrary to the provisions of the law. Therefore, we submit that the Respondent was not unfairly terminated from employment because she repudiated her employment contract by absconding duty.

The Respondent's submissions

23. The lower court's holding that the termination was unprocedural for flouting Section 41 is unimpeachable. Section 41 mandates employers terminating for misconduct including gross misconduct like absconding to notify allegations, afford a hearing, and consider responses. The Appellant, despite invoking gross misconduct, terminated summarily without these steps, rendering the process void. (See pages 166-168 of the record of appeal.). The Appellant in its Memorandum of Appeal and further in its submissions has alleged that the learned trial

Magistrate failed to appreciate pleadings and evidence in making a finding that the Respondent was unfairly terminated, however a thorough perusal of the judgment reveals that the lower court thoroughly analyzed the Appellant's Memorandum of Response admitting alleged gross misconduct and the Respondent's pleadings alleging no hearing. correctly applying the dictum in *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* wherein it was observed as follows: (See pages 1-71 of the record of appeal.) "... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination." Similarly in *Ngagaya v Securitas Kenya Limited [2025] KEELRC 1714 (KLR)* it was observed as follows: The Respondent stated that the claimant absconded duty but no evidence was filed of service on the claimant's notice of intention to terminate the employment relationship as per section 41 of the Employment Act. Absconding is gross- misconduct and a valid ground to terminate employment. The court agreed the claimant left work unauthorised. The termination ought to be done following the procedural process under section 41 of the Employment Act. In *Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR* the Court stated, 'an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.'" The employer failed to prove even the alleged calls to the claimant and it was at fault for non-compliance with procedural fairness." (Emphasis ours.) The Appellant's plea that absconding exempts hearings is fallacious jurisprudence demands efforts to contact the employee, and it's preposterous for the Appellant to allege calling the Respondent when it neither led nor adduced no such

evidence in the lower court. It is noteworthy that the Respondent in her submissions before the lower court disputed the Appellant's allegation as regards absconding and raised the following issues: (See pages 73-74 of the record of appeal.) The averment that she absconded work from 02/07/2022 without leave is otiose, misplaced and solely advanced to mislead this Honourable Court since there is no way the Respondent could have absconded work from the said date given that she had already been summarily dismissed as of 01/07/2022. The Appellant cannot be heard to rely on the letters it purports to have sent to the Claimant on 06/07/2022 and on 12/07/2022 since on both dates the Claimant was no longer an employee of the Appellant owing to the adverse action taken by the Appellant's Human Resource Manager in summarily dismissing the Claimant as of 01/07/2022. c) d) The Appellant in keeping with its mendacious response has gone as far as stating that the Respondent deserted her duties as of 01/07/2023 despite the fact that not only is the said date was more than a year when the Respondent was summarily dismissed but also the contract governing the parties was set to lapse on 24/09/2022. (See paragraph 12 of the Respondent's Memorandum of Response contained in page 34 of the record of appeal.) The Appellant cannot be heard to state that the Respondent left work on her own volition when it is clear that she was summarily dismissed by the Appellant's Human Resource Manager and over and above the purported letters allegedly sent to the Respondent there is no explanation or proof provided of the steps taken by the Appellant to trace the Respondent and subject her to disciplinary process if at all as contemplated in the law. In the seminal case of *Muani v Epco Builders Limited* [2025] KEELRC 476 (KLR), wherein the court was faced with a case of absconding as alleged by the Appellant in the present case, the court cited with approval the case of *New World Stainless Steel Limited v Cosmas Mbaulu Munyasya* (2021) e KLR pronounced itself

as follows: "Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered. The court found no evidence was produced by the Respondent of any effort to reach the appellant with a view of putting him to notice of termination on the alleged ground of absconding." (Emphasis ours) As regards the Appellant's allegation that the learned trial Magistrate erred by failing to consider the attendance sheets as regards allegations of absconding and that the Respondent absconded duty and was not terminated, we humbly submit that this allegation is hogwash since the court did consider all the rival documents as well as submissions filed by the parties before arriving at a judicious judgment in consonance with decided precedent as regards absconding as alleged by the Appellant. That further to the preceding paragraph and as already argued in paragraph 15 above the Appellant's heavy reliance on the issue of absconding is misplaced since the Respondent pleaded that she had been summarily dismissed on 01/07/2022 and as such as of 02/07/2022 when she is said to have absconded from work the same amounts to an afterthought since she was no longer an employee of the Appellant and throughout its pleadings in the lower court the Appellant chose to remain silent on the Respondent's version of events especially surrounding the events of 30/06/2022 as well as 01/07/2022 but in any event the learned trial Magistrate as explained in paragraphs 12, 15 and 17 above did arrive at a judicious finding as far as the circumstances of this case is concerned far from the Appellant's contention that the judgment is not jurisprudentially proper." The Appellant's reliance on attendance sheets to bypass procedure is misplaced, as documents alone do not substitute for hearings as per *Ngagaya v Securitas Kenya Limited* [2025] KEELRC 1714 (KLR), affirming absconding as gross

misconduct but requiring Section 41 compliance. This ground fails for lack of evidential support and legal merit. Additionally, the Appellant's procedural arguments overlook the constitutional dimension: Article 41(2)(c) demands fair conditions, including hearings. Allowing exemptions for absconding would encourage employer impunity, contrary to public policy. ii) Whether the court mis appreciated evidence on substantive fairness. Substantively, the lower court correctly found no valid reason under Section 43 of the Employment Act. The Appellant's reliance on attendance sheets was uncorroborated-no witnesses or reports substantiated absconding beyond self-serving documents. In the Respondent's medical evidence rebutted this, unaddressed by the Appellant and as such the Appellant's substantive claims fail the Section 43 test, requiring "valid reason" proved on balance of probabilities. Their evidence was hearsay, lack in a corroboration. (See Pages 166-168 of the record of appeal. 22. The Appellant has alleged that no termination letter or evidence was produced to warrant unfair termination, but we humbly that this is disingenuous since the Appellant themselves annexed a letter dated 12/0//2022 purporting that the Respondent will be taken has having left work on her own volition as of 12/07/2022 and we submit that this contention is indeed not only spurious but also laughable in light of the Respondent pleadings wherein it was pleaded that she had been summarily dismissed as of 01/07/2022 and denied entry into the Appellant's premises ever since such that as of 02/07/2022 the Respondent cannot be said to have absconded since she was no longer the Appellant's employee. (See page 66 of the record of appeal.)

DECISION

24. 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).

25. The grounds of appeal under the issue were as follows-

a. The Honourable Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the pleadings and evidence before it and in arriving at a decision which is not supported by or is manifestly against the weight of the evidence.

b. The Honourable Magistrate erred in law and in fact by disregarding the totality of the Appellant's pleadings, documents and cited authorities and as a result arrived at a decision materially unsupported by the law quite contrary to established jurisprudence.

c. The Honourable Magistrate erred in law and in fact in finding in favour of the Respondent and directing the termination of the Respondent was unfair.

d. The Honourable Magistrate erred in and fact by finding that the Respondent's employment was unfairly terminated yet the Respondent never produced a termination letter or any evidence to substantiate the allegation for unfair termination.

e. The Honourable Magistrate erred in law in finding in favour of the Respondent by disregarding the attendance sheets which showed that the Respondent deserted duty.

16. The Honourable Magistrate erred in and fact by finding that the Respondent's employment was unfairly terminated yet the Respondent never produced a termination letter or any evidence to substantiate the allegation for unfair termination.

17. The Honourable Magistrate erred in law in finding in favour of the Respondent by disregarding the attendance sheets which showed that the Respondent deserted duty.

18. The Honourable Magistrate erred in law and fact by awarding the Respondent unpaid annual leave yet the same was not proven to the required standard.

19. The Honourable Magistrate erred in law and fact by failing to appreciate that the Respondent absconded duty and was not terminated from employment.

26. The parties by consent opted to proceed by way of documentation before the trial court. The respondent in statement of claim pleaded she was dismissed from service on the 1st July 2022. That she was on night shift when the HR summoned her to office on night of 30th June

2022 with allegations of gross misconduct on account of absenteeism. That on the night shift of 1st July 2022 she was again summoned by HR and asked to resign, and she declined after which she was asked to relinquish all appellant's property and escorted out by security, searched and ejected from the premises (paragraphs 8-11 of the claim at page 3 of ROA). The Respondent stated she had a contract which was to expire on 24th September 2022. In support of her case, among others, the respondent relied on her fixed term contract which was set to expire on 24th September 2021 (page 13 ROA/), and the NSSF statement covering January 2021 to July 2021 (page 31 of ROA).

27. Conversely, the appellant in response to the suit stated that the respondent was absent from work from 2nd July 2022 without authority till 6th July 2022. The appellant stated that it issued a letter for explanation. That on 12th July 2022, the respondent, having not reported, issued a letter that the respondent was deemed to have vacated the post of her own volition, effective 12th July 2022. (page 33 of the ROA) The appellant contended that it was not until the respondent received the letters of 6 and 12 July 2022, which she received herself in Vihiga, that she instituted the claim. Among the documents relied on by the appellant before the trial court is the renewal of the fixed-term contract letter dated 24th June 2022 to 24th September 2022. The respondent accepted the renewal on even date (page 62 of ROA). The letters of 6th July 2022 and 12th July 2022 on the absenteeism and the certificate of posting (pages 64-67 of ROA). The employee attendance sheet for the material period with July indicating absence (page 71).

28. The trial court held the termination was unfair as the claimant was not given an opportunity to be heard on the absence. The trial court relied on the sick leaves to hold that the respondent had a good reason for absence, but was not given an opportunity to be heard. The trial court did give weight to the notices of 6 July and 12th July 2022 issued to the respondent and posted. The respondent in submissions stated that, having been dismissed on 1st July 2022, the issue of the letters dated 6th and 12th July 2022 could not apply. The Respondent did not deny having received the notices of absence of 6 and 12th July 2022. Nothing would have been easier than to respond to the said letters and state she was dismissed. The respondent did not corroborate her allegations of having been dismissed by the HR in any way. The case proceeded by way of documentation. The appellant produced documents as employer to confirm the contract was in place ending on 24th September 2022, and attendance sheets to confirm that the respondent was last at work on 30th June 2022 and not on 1st July 2022 as alleged. The Court found that the alleged absenteeism on sickness reason was based on sick sheets for month of April and May and the respondent was at work entire of June so the allegations of being accused of absenteeism on 30th June could not hold water. The fact that the employer took steps to comply with section 41 of the Employment Act by issuance of notices on the absenteeism on 6th and 12 June 2022 under certificate of postage was prima facie evidence that the respondent had absconded duty. The court has held that on absconding employer ought to take steps to end the relationship. The court finds the letter of 12th July 2022 ended the employment relationship after the non-responsive letter of 6th July 2022 to the respondent to show cause for absconding. Absconding is a gross misconduct under section 44 of the Employment Act and a valid reason to terminate employment. Procedural fairness was evidenced by the letters of the appellant dated 6 and 12

July 2022. I upheld the decision relied on by the respondent in New World Stainless Steel Limited v Cosmas Mbaulu Munyasya (2021) e KLR pronounced itself as follows: "Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered. The court found no evidence was produced by the Respondent of any effort to reach the appellant with a view of putting him to notice of termination on the alleged ground of absconding." The appellant in the instant case is held to have complied with section 41 through the issuance of the 2 notices. The court, for the foregoing reason, holds that the trial court erred in fact and law in finding unfair termination. The termination is held as fair.

Whether the trial court erred in fact and law on reliefs

29. The appellant raised a ground of appeal that the trial court erred in granting leave, alleging it was not proved to the required standard. The appellant did not explain the said standard. The claim was for the unpaid leave of 2021. The claimant relied on her filed documents. The claimant produced pay advice of leave encashment, which indicated leave balance as at December 2021 to be 8.75 days. The same was paid. (page 21 of ROA). The trial court simply said the claim for leave was justified. I find that in view of the leave encashment on 31st December 2021, the award for leave amounted to double payment and is set aside.

30. The relief of notice pay and compensation has no leg to stand on, the court having held the reasons for absconding were proved, and there was procedural fairness vide the 2 letters sent to the respondent. The award for notice pay and compensation are set aside.

31. In the upshot the appeal is allowed. The Judgment and Decree of the Hon. D.K. Kuto (SPM) delivered on 6th February 2025 in Mavoko MCELRC Cause No. E006 of 2023 is set aside and substituted with a judgment that the claim is dismissed with costs to the respondent.

32. Cost of the appeal to the appellant.

33. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY
OF DECEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ochieng h/b Ms. Odongo

Respondent – Langat H/b Jeruto

ORIGINAL