



**Africa Apparels EPZ v Ntinde (Civil Appeal E056 of 2024)
[2026] KEELRC 196 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E056 OF 2024
DKN MARETE, J
JANUARY 28, 2026**

BETWEEN

AFRICA APPARELS EPZ APPELLANT

AND

ELIZABETH NYABOKE NTINDE RESPONDENT

JUDGMENT

1. This matter originated by way of Memorandum of Appeal dated 5th March, 2025. It comes out as follows;
 1. That the Honourable Magistrate erred in fact and law by making a determination that the Claimant had been underpaid from the year 2013 to the year 2021 and is entitled to Kshs. 746,376.56 contrary to the evidence produced by the Respondent.
 2. That the Honourable Magistrate erred in fact and in law by failing to acknowledge that the Claimant had been employed on a 6-month fixed term contract running from 1st July 2021 and lapsing on 23rd December 2021.
 3. That the Honourable Magistrate erred in fact and in law by failing to acknowledge that due to the Claimant's 6-month fixed term contract, she could not have been in continuous employment since 2013; hence the Court made a determination based on a contract that was not subject to its jurisdiction.
 4. That the Honourable Magistrate erred in fact and in law by failing to properly evaluate the evidence adduced by the Claimant to note that; - The medical reports relate to the period of June 2020 and yet the Claimant alleges she was lawfully absent from work on account of sickness in October 2021 and by failing to acknowledge that the Claimant never produced a Doctor's report from any credible facility to justify her alleged "sickness" and willful absence from employment as is required by the law



5. That the Honourable Magistrate erred in fact and law by holding that the ingredients for a claim of unfair termination had been met yet the Claimant willfully and without justification absconded duty.
 6. That the Honourable Magistrate erred in fact and law by taking into account irrelevant considerations and ignoring critical matters hence leading to a miscarriage of justice.
 7. That the Honourable Magistrate erred in fact and law by applying wrong principles pertaining to assessment of damages thereby arriving at a manifestly excessive and erroneous award both factually and legally.
 8. That the Honourable Magistrate erred in fact and law by awarding excessive compensation of 6 months' salary for the Claimant who had unjustifiably left her place of work and had not been terminated.
 9. That the Honourable Magistrate erred in fact and law by failing to properly consider the comparable judicial authorities availed for consideration and thereby purporting to overturn superior court decisions.
 10. That the Honourable Magistrate erred in fact and in law by failing to consider, evaluate and give due weight to the Appellant's submissions and thereby occasioning a miscarriage of justice.
2. The Appellant prayed for orders That:
1. This appeal be allowed in its entirety, set aside the judgment of the lower/chief magistrates court and all consequential orders thereto and dismiss the suit against the Appellant;
 2. Costs of this appeal and the lower court be borne by the Respondent;
 3. Such other or further orders which may be appropriate in the circumstances and as may be ordered by this Honourable Court.
3. The Appellant submitted that the Respondent was lawfully granted leave to attend a burial in September 2021. Upon the expiry of the agreed leave period, however, the Respondent failed to resume duty and, from 25th September 2021, absented herself from the workstation without leave, lawful cause, or any communication to the Appellant's Human Resource Department. The Appellant emphasized that for more than fifteen (15) consecutive days the Respondent neither reported to work nor communicated her whereabouts contrary to the obligations imposed upon employees under section 44(4)(a) of the *Employment Act*, 2007 which categorically treats absence from work without leave or lawful cause as gross misconduct.
4. Several weeks later, in or about October 2021, the Respondent's husband delivered medical chits purportedly justifying her absence. Upon examination, the Appellant discovered that the documents bore dates of 11th June 2020, while the attached medical report related entirely to June 2020, bearing no relevance to the absence commencing 25th September 2021. Further, the medical report irregularly purported to cover the period from 11th June 2020 to 1st November 2021, a span which was impractical and raised serious doubts about authenticity. The Respondent was requested to provide a valid medical certificate covering the period from 25th September 2021, as required under section 30 of the *Employment Act*, 2007 but failed and refused to do so.
5. The Appellant submitted that, following the Respondent's continued unexplained absence beyond fifteen (15) days, it reasonably concluded that she had abandoned her employment. Consequently, a formal letter dated 15th November 2021 was sent to the District Labour Officer, and the relevant trade



- union was notified. The Respondent, however, failed to present herself before the labour office and instead instituted suit.
6. In support of its position, the Appellant relied on *Joseph Njoroge Kiama v Summer Ltd (2014) eKLR*, where the Court held that absence from work for ten (10) days without permission justified summary dismissal under section 44 of the *Employment Act*. Reliance was also placed on *Victor S. Agesa v Henkel Chemicals EA (2017) eKLR*, affirming that unexplained absence constitutes gross misconduct under sections 44(3) and 44(4). The Appellant further submitted that the Respondent failed to engage internal grievance or disciplinary mechanisms before instituting suit, relying on *Esha Chizi Lugogo v PACT Kenya (2013) eKLR*, citing *Jackson Butiya v Eastern Produce Limited (Industrial Cause No. 335 of 2011)*, where the Court held that an employee deliberately avoiding internal mechanisms cannot later allege procedural unfairness. The Appellant contends that the finding of unfair termination was contrary to sections 41, 43, 44, and 47(5) of the *Employment Act*, and unsupported by the evidence on record.
 7. The Appellant also submitted that the Respondent was engaged on a six-month fixed-term contract commencing 1st July 2021 and lapsing on 23rd December 2021. Notwithstanding her absence, the contract lawfully lapsed by effluxion of time, as there was no provision guaranteeing renewal. Reliance was placed on *George Onyango v Numerical Machining Complex Ltd & Others [2014] eKLR*, which held that fixed-term contracts terminate automatically upon expiry and do not give rise to a legitimate expectation of renewal. The Appellant further contended that the finding that the Respondent was underpaid from 2015 to 2021 was erroneous. During the subsistence of the last six-month contract, the Respondent earned a basic salary of Kshs. 15,692 plus 15% house allowance, in compliance with the Regulation of Wages (General) (Amendment) Order, 2018. Claims predating three (3) years from filing suit were statute-barred under section 90 of the *Employment Act*. Reliance was placed on *Cotec Security Group Ltd v Kenya National Private Security Workers Union (Appeal F023 of 2023) [2024] KEELRC 610*. The Appellant submitted that the trial court's award of Kshs. 746,376.56 was unlawful and ought to be set aside.
 8. The Appellant further submitted that the Respondent was paid all accrued leave and leave travel allowance upon the lapse of her initial contract on 30th June 2021, evidenced by the July 2021 payslip. During the subsequent six-month contract, the Respondent was granted leave in September 2021 but failed to return to work. Under section 28 of the *Employment Act*, 2007 leave accrues during active service, and the Respondent could not lawfully claim additional leave pay. On notice pay and compensation for unfair termination, the Appellant submitted that the Respondent failed to discharge the burden of proof under section 47(5) of the *Employment Act*, having produced no termination letter or evidence of dismissal. Reliance was placed on *Albert Mutekhele Maunda v Postal Corporation of Kenya [2019] eKLR*.
 9. In her defence, the Respondent submitted that her absence from duty commencing 25th September 2021 was lawful and justified. She testified that while on approved leave, she fell ill and was admitted at MC Health Lane, Buruburu, where she was placed on medical bed rest for fourteen (14) days, facts she testified to in court on 30th October 2023 while adopting her witness statement dated 17th February 2023. The Respondent further submitted that her husband delivered the medical chit to the Appellant, and that upon attempts to resume duty in October and November 2021, she was informed by the Human Resource Manager, Ms. Florence Karimi Kyongo, that she had already been removed from the employment register.
 10. The Respondent emphasized that illness constitutes lawful and justifiable cause for absence under section 44(4)(a) of the *Employment Act*. She contended that no evidence was tendered to demonstrate that her absence was deliberate, unjustified, or without lawful cause. The Respondent further



- submitted that allegations of abscondment or desertion were not proved, and the burden of proof rests on the employer under sections 43(1) and 45(2)(a) of the *Employment Act*. She relied on *James Okeyo v Maskant Flower Limited* [2015] eKLR , noting that desertion requires proof of intention not to return, which cannot be presumed. No evidence was placed before the Court demonstrating any conduct showing intent to abandon employment; on the contrary, she made attempts to resume duty, as affirmed in *Vincent Makori Momanyi v Techpak Industries Limited* [2022] eKLR .
11. The Respondent further submitted that the Appellant failed to take positive steps upon realizing her absence, such as issuing a recall notice, notice to show cause, or convening a disciplinary hearing, as required under section 41 of the *Employment Act*. She relied on *Mwaidza v Batitio General Contractor & Suppliers Limited (Appeal E053 of 2023)* [2024] KEELRC 395 (KLR) which held that absent a demonstration of such efforts, an allegation of desertion cannot stand. The Respondent contended that correspondence sent to advocates without proof of personal service does not meet the evidentiary threshold, citing *Vincent Makori Momanyi v Techpak Industries Limited* [2022] eKLR .
 12. The Respondent submitted that her employment was terminated on 2nd November 2021, prior to the lapse of her fixed-term contract, and that the Appellant did not plead effluxion of time before the trial court but pleaded abscondment. She contended that the termination was effected without notice, without reasons, and without compliance with due process, in violation of sections 35, 41, 43, and 45 of the *Employment Act*. Further, no report was made to the Labour Officer following the dismissal as required under section 18(5)(b) of the *Employment Act*, 2007.
 13. The Respondent's claim, filed on 5th August 2022, fell within the three-year limitation period prescribed under section 90 of the *Employment Act*, as affirmed in *Vipingo Ridge Limited v Swalehe Ngonge Mpita* [2022] eKLR . The Appellant failed to produce statutory employment records, including leave schedules, triggering section 10(7) of the *Employment Act*, 2007 and shifting the burden of proof to the employer.
 14. It is indisputed that the Respondent was granted leave commencing 25th September 2021 to attend a burial, with an agreed return date of 2nd October 2021. However, the Respondent testified that she fell ill while on approved leave, was placed on medical bed rest, communicated via her husband, and later attempted to resume duty. Section 44(4)(a) permits dismissal for absence without leave or lawful cause.
 15. The law is settled that desertion requires proof of absence and intent not to return. In *Stanley Omwoyo Onchweri v Board Of Management Nakuru YMCA Secondary School* [2015] eKLR , the Court observed that an employer must demonstrate efforts to trace the employee, issue ultimatums, and conduct a hearing before concluding desertion. Here, the Appellant produced no evidence of such steps, nor any disciplinary proceedings under section 41, nor any forensic evaluation of the medical documents. This Court is further guided by *Daudi Msagha v Auto Continental Limited* [2019] KEELRC 204 (KLR) , which reiterates that allegations of desertion must be supported by demonstrable steps taken to notify the employee.
 16. Accordingly, the Appellant failed to discharge the burden under sections 43(1) and 45(2)(a) of the *Employment Act*, 2007. Section 45(2) of the Act requires demonstration of valid and fair reasons for termination along with procedural compliance. The Appellant denied termination but effectively locked the Respondent out of employment, which the Court can infer as termination, as affirmed in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR . Under section 47(5), the burden of proving unfair termination rests on the employee, whereas the employer must justify termination; the Appellant failed to do so. The termination of the Respondent's employment was therefore substantively and procedurally unfair, violating sections 41, 43, and 45.



- 17. Although the Respondent was employed on a fixed-term contract from 1st July 2021 to 23rd December 2021, parties are bound by their pleadings. The Appellant pleaded abscondment, not effluxion of time. As held in *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 Others* [2014] eKLR parties cannot raise new claims not in the original pleadings. The Respondent’s evidence indicated removal from the employment register on 2nd November 2021 prior to contract expiry and was unrebutted. Thus, effluxion of time is unavailable as a defence.
- 18. The trial court awarded underpayment arrears spanning several years. Section 90 of the *Employment Act* limits claims to within three years preceding filing. The Respondent filed suit on 5th August 2022; any claims prior to 5th August 2019 were statute-barred. Reliance was placed on *Cotec Security Group Ltd v Kenya National Private Security Workers Union* [2024] KEELRC 610 . The trial court failed to properly interrogate this limitation issue; any award covering periods outside the statutory timeframe was in error.
- 19. Again, Section 49(1)(c) of the *Employment Act* empowers the Court to award compensation up to twelve (12) months’ salary for unfair termination under section 49(4). While appellate courts are slow to interfere with discretion, intervention is warranted where discretion is exercised on wrong principles or without regard to relevant factors, as in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR. Considering the short duration of the last contract and surrounding circumstances, the trial court’s award of six (6) months’ salary was excessive and disproportionate.
- 20. This court find that the trial court’s award was based on a full evaluation of the evidence and application of the law. The only minor area of intervention is the award of six months compensation for unlawful termination of employment. bearing in mind the circumstances and nature of the termination of employment and also the fact that the claimant was on a six month fixed term contract, and award of six months compensation become unsustainable. It is on the higher side. It is not worthy to compensate the Respondent with an equivalent of their entire pay for the whole fixed term contract even in the event of unfair termination of employment.
- 20. I am therefore inclined to partially allow the claim, order and review the award as follows;
 - i. One month compensation for unlawful termination of employment.....Kshs18,046.00
 - ii. Each party shall bear the costs of this appeal.

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF JANUARY 2026.

D. K. NJAGI MARETE
JUDGE

Appearances :

Mr. Juma instructed by Simiyu and Partners Advocates LLP for the Appellant.

Mr. Rakoro instructed by Rakoro & Company Advocate for the Respondent.

