

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

MOMBASA

APPEAL NO. E 022 OF 2025

MILLY GLASS WORKERS LIMITED.....APPELLANT

VERSUS

TUNGA TUNJE MUNGA..... RESPONDENT

*[Being an Appeal from the Judgment of Honourable R. N. Akee (Ms),
Principal Magistrate, delivered on 30th January 2025, in Mombasa CMEELRC
E 712 OF 2023]*

JUDGMENT.

Introduction

1. Contending that at all material times he was an employee of the Appellant serving under a fixed-term contract, but that his service was terminated prematurely and unfairly before its appointed lapse date, the Respondent sued the Appellant in the above-mentioned lower court suit, claiming notice pay, compensation by way of salary for the remainder of the contract period, compensation for unfair termination, gratuity, compensation for earned but unused leave days, and general and punitive damages for deprivation of his right to join a trade union.

2. The Appellant countered the Respondent's claim with a Statement of Response dated 26 April 2024. They argued that the Respondent had voluntarily resigned from his employment. Therefore, his allegations of unfair dismissal and his quest for remedies in his pleadings were without merit.
3. Upon hearing the parties on their respective cases, the trial Court allowed the Respondent's case and awarded him all the "terminal dues claimed in the Memorandum of Claim." Aggrieved by the decision, the Appellant filed the instant appeal, challenging the entire decision.

Respondent's case before the Lower Court.

4. In his claim, the Respondent contended that he first came into the employment of the Appellant as A Forklift Operator in its Transport Department under a fixed-term contract of six months, which ran from January 2020. At the lapse of six months, the contract was further renewed for another six months in July 2020.
5. He further stated that under a third fixed-term contract executed on 7th December 2020, the Appellant employed him for a further year. His monthly salary was KShs. 21, 067.00.
6. He further stated that at all material times, the Appellant and the union had a collective bargaining agreement;

however, he was consistently prevented from joining the union because the Appellant repeatedly threatened that if he did so, his contract would not be renewed.

7. On 31st August 2021, he reported to work as usual, only to be served with an internal memo citing Poor Performance Results. The letter stated that his employment was being terminated due to his below-average performance. The Respondent offered him redeployment to another department, and he was required to make a decision on or before 9th September 2021.
8. Before he would consider the offer for redeployment and communicate his decision, he was on the 8th September 2021 to summoned to the Respondent's offices to collect his final dues.
9. The Appellant's contention that his performance was poor was an afterthought, as poor performance was not to his attention at any time during his employment. He was not given an opportunity to defend himself against the allegation. His employment was unfairly terminated.

The Appellant's Case Before the Lower Court.

10. The Appellant presented one witness, Lily R.K Mulusa, its Human Resources Manager, to testify in support of its defence against the Respondents' case. She adopted her witness statement dated 26th April 2024 as her evidence in chief.

11. The Witness stated that the Respondent was employed by the Appellant as a Forklift Operator under various fixed-term contracts. His last engagement was under the contract dated 7th July 2020, which was due to expire on 31st December 2021.
12. On 19th August 2021, the Respondent's performance as a Forklift Operator was evaluated by an independent third party and found to be below average. Upon deliberations, the Appellant proposed to reassign the Respondent to a different role of his choice within the company. Alternatively, the Appellant was at liberty to resign from employment. The options were communicated to the Respondent in writing.
13. The Respondent, through a letter written on 31st August 2021, opted to resign from his employment with immediate effect. Despite the resignation, he was still paid one [1] month's salary in lieu of notice and for the 13.5 earned but not utilised. He was issued a cheque of KShs. 27, 860.00.
14. The Respondent has employees who are union members. There would be no reason to single out the Respondent. There was no intimidation or victimisation; otherwise, the Union would have lodged a complaint with the Cabinet Secretary.
15. Admittedly, the Respondent was not a member of the Union; he could not claim leave travelling allowance or gratuity pay, which were only available to the Union members who

contributed union dues. In any event, the Collective Bargaining Agreement dated became effective after the separation.

16. The witness stated that the contract was to come to an end on 30th June 2016 by effluxion of time, and through a letter of the same date, the Appellant informed him that the contract was not going to be renewed.
17. The Respondent, having resigned from employment and paid all his terminal dues, could not be entitled to any of the reliefs he sought.

The Judgment by the Lower Court.

18. After hearing the parties on their respective cases, the Learned Trial Magistrate delivered his judgment on 30th January 2025, and awarded the Respondent all the terminal dues claimed in the Memorandum of Claim. A decree was extracted for KShs. 386, 016.29, costs and interest.

The Appeal

19. Aggrieved by the Judgment, the Appellant filed the instant appeal assailing the same on the following grounds;
 - I. The learned Magistrate erred in law and fact in failing to find that the Respondent had resigned from employment.
 - II. The learned Magistrate, at any rate, erred in law and fact in awarding the monetary claims sought.

Analysis and Determination

20. As this is a first Appeal, this Court must re-examine the material presented to the trial Court and reach its own independent findings and conclusions. This approach was thoroughly explained in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123**; see also **Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270**.
21. I have carefully considered the pleadings and the evidence by the parties before the trial court, and the respective submissions by Counsel for the parties in this appeal. In my view, the appeal shall justly be determined by considering the following broad issues: Was the termination of the Respondent's employment at the initiative of the Appellant? and Was the Respondent entitled to the reliefs granted by the trial Court?
22. Time and again, this Court has stated that well-identified and clearly framed issues for determination often act as beacons, guiding the Court in rendering an organised and just judgment without wandering. Issues for determination shall normally flow from the parties' pleadings, evidence and, if made, submissions. It is therefore imperative that they receive keen attention when a judgment is being prepared.
23. I have carefully considered the whole of the Judgment of the Learned Magistrate and find no basis to conclude that she didn't properly and sufficiently identify and frame the issues for determination in respect of the matter before her, or even consider and evaluate the parties' pleadings and evidence with the requisite care. For instance, the learned

trial Magistrate identified a sole issue for determination, whether the suit was merited. This can seldom be considered a sufficiently identified issue to guide a court to make a concise judgment.

24. I agree with the Counsel for the Appellant's submissions that the learned trial Magistrate failed to identify the vital issues that arose in the matter before her and to consider them adequately. With great respect to the learned trial Magistrate, her judgment is too mixed up and not flowing, as a result of her failure to adequately identify the issues for determination flowing from the pleadings and evidence before her.
25. The Appellant's case was that the Respondent voluntarily resigned from employment. As such, his claim for unfair termination was ill-founded.
26. The Respondent tendered in evidence before the trial court an undated letter by the Respondent that read;
"To Human Resources, Milly Glass Work. I, Tunga Tunje Munga, have come to agreement with the company on the letter given on 31/08/ 21 of Performance Review Result. I accepted the option of termination by the management with effect from 31/08/2021."
27. The Respondent's Counsel argues that, although there is no denial that the letter was written by the Respondent, it

cannot be characterized as a resignation, as the Appellant has attempted to characterise it.

28. At this stage, it is essential to emphasise that, within employment law, the origin of the initiative for separation constitutes a significant and consequential issue in any dispute concerning the manner in which an employee's separation from employment occurs. Furthermore, it is crucial to note that resignation represents a unilateral and voluntary act by the employee to terminate the contract, whereas termination is an action initiated by the employer, even if the employee consents to or accepts it.

29. The letter is explicit on three critical points:

a) “ **I have come to an agreement with the Company**”. In my view, this indicates a mutual understanding with the Company, not a unilateral decision.

b) “**I accept the option of termination by management.**” The termination act is expressly attributed to the management, not the employee.

c) “**With effect from 31st August 2021.**” This fixes the effective date of termination, but does not convert the act into resignation.

30. In my view, the letter demonstrates a mutually agreed separation rather than a resignation. Mutual separation is one way an employee's employment can be brought to an end by the parties. Inarguably, where it is clear that an

employment relationship ended as a result of a mutual separation, there cannot be a window for the employee to turn around and claim unfair termination.

31. If the learned trial Magistrate had made the manner of separation an issue for determination, she could have found that the separation was mutual and held that the Respondent hadn't discharged his legal burden under section 47[5] of the Employment, prima facie demonstrating that his employment was unlawfully terminated without adherence to the dictates of procedural and substantive fairness. The Respondent's case was supposed to collapse at that hurdle.
32. In the upshot, I hold that the termination of the employment relationship was mutual. The Respondent's claim for unfair termination was therefore unfounded.
33. Having held as I have hereinabove, I do not hesitate to conclude that the Respondent wasn't and isn't entitled to the compensatory relief contemplated under section 49[1][c] of the Employment Act for an employee who successfully challenges his or her employer's decision to terminate his or her employment.
34. The Appellant argued, and this was uncontested, that the cheque issued to the Respondent for KShs. 27,860 included one month's salary in lieu of notice and payment for accrued but unused leave days. It is therefore unclear on what grounds the learned trial Magistrate granted the two reliefs.

35. Having found that there was no unfair termination of the Respondent's employment, as I have hereinabove, but that what occurred was a mutual separation, I hesitate not to conclude that the award of payment for the remainder of the contractual period was unmerited. Further, it is important to point out that under section 49 of the Employment Act, relief for anticipatory salary isn't contemplated. Courts of law only grant remedies recognised by the law within their jurisdictions.
36. Article 41 of the Constitution recognises an employee's right to fair labour practices, including the liberty to join a trade union and to participate in union activities without hindrance. Where it is demonstrated that the employer hindered the enjoyment of the right, an order to pay general damages for the violation of the right, and any loss arising as a result of the violation, would readily be made if the violation is established.
37. I have thoroughly reviewed the material presented to the trial Magistrate and find no evidence from the Respondent showing that the Appellant prevented him from joining the Union. His claims consisted only of unsubstantiated assertions.
38. Undoubtedly, the Respondent was not a member of the Union. He could not, therefore, rely on a CBA between the Union and the Appellant to claim and obtain the relief of gratuity.

39. In conclusion, I find that the Appellant's appeal has merit. The judgment of the lower court is hereby vacated. Accordingly, this Court dismisses the Respondent's suit in the lower court with costs.

READ, DELIVERED AND SIGNED THIS 29th DAY OF JANUARY 2026.

OCHARO KEBIRA.
JUDGE

ORIGINAL