



REPUBLIC OF KENYA



**Catch Security Links Limited v Mboya (Appeal E019 of 2025)
[2026] KEELRC 344 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E019 OF 2025
JW KELI, J
FEBRUARY 6, 2026**

BETWEEN

CATCH SECURITY LINKS LIMITED APPELLANT

AND

BEATRICE MBOYA RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. B. Ojoo (CM)
delivered on 5th April 2025 in Mavoko MCELRC No. E013 of 2023)*

JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. B. Ojoo (CM) delivered on 5th April 2025 in Mavoko MCELRC No. E013 of 2023 filed a Memorandum of Appeal dated the 23rd of April 2025 seeking the following orders: -
 - a. The Appeal be allowed and this Honourable Court be pleased to set aside the whole judgment of the Learned Trial Magistrate.
 - b. This Honourable Court be pleased to enter judgment for the Appellant and dismiss the Respondent's claim as filed in the lower court.
 - c. The Appellant be awarded the costs of this Appeal.

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in law and in fact in disregarding the Appellant's evidence and as a result arriving at a wholly erroneous decision.
3. The Honourable Magistrate erred in law and in fact in finding that the Respondent's termination by the Appellant was unlawful and procedurally unfair.



4. The Honourable Magistrate erred in law and in fact in holding that the Respondent had proved her claim and the Appellant had failed to discharge its burden of proof.
5. The Honourable Magistrate erred in law and in fact in holding that the Respondent's evidence on unlawful termination was unshaken by the Appellant yet the Respondent had failed to prove that the screenshot of the SMS for termination she produced was sent by the Appellant's Supervisor or employee or at all.
6. The Honourable Magistrate erred in law and in fact in finding that the Respondent's evidence was not controverted.
7. The Honourable Magistrate erred in law and in fact in disregarding the Appellant's evidence proving the Respondent deserted work and was issued with a notice to show cause letter however, the said letter did not elicit any response from the Respondent.
8. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 48,387.63 (3months gross salary) being compensation for unfair termination despite evidence that the Respondent deserted work.
9. The Honourable Magistrate in law and in fact in awarding the Respondent Kshs.16,129.21 being salary in lieu of notice despite the Appellant's evidence that the Respondent deserted work.
10. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 382,200.00 being unpaid overtime yet no evidence was tendered by the Respondent to substantiate the allegation.
11. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 53,947.77 being unpaid house allowance despite having an all-inclusive salary agreement of Kshs. 15,000.00 between the parties.
12. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 227,855.00 being unpaid rest days and public holidays yet no evidence was tendered by the Respondent to show that she used to work during holidays and rest days.
13. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 179,299.74 being underpayment from 2019-2022 despite the Respondent acknowledging she was paid salary through the bank but failed to produce bank statements to show her monthly salary.
14. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 400.00 being unpaid NSSF remittance yet the same was not prayed for in the memorandum of claim by the Respondent.
15. The Honourable Magistrate erred in law and in fact in awarding the Respondent Kshs. 17,929.12 being annual leave despite leave forms produced by the Appellant proving that the Respondent went for paid leave yearly.
16. The Honourable Magistrate erred in law and in fact in disregarding the Appellant's evidence, written submissions and authorities relied upon.

Background To The Appeal

17. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 20th February 2023 seeking the following orders: -
 - a. A declaration that the Claimant's termination is wrongful and unfair.



- b. An order that the respondent to pay the Claimant Kshs.1,092,672.74/= as terminal dues made up as follows: -
- i) Kshs.16,129.21/= being 1 month salary in lieu of notice.
 - ii) Kshs.179,299.74/= being unpaid underpayment.
 - iii) Kshs.53,947.77/= being unpaid House Allowance.
 - iv) Kshs.382,200/= being overtime.
 - v) Kshs.152,880/= being unpaid rest days.
 - vi) Kshs.14,401.12/=being unpaid annual leave.
 - vii) Kshs.3,528/=being unpaid pro-rata leave.
 - viii) Kshs.75,055/= being unpaid public holiday.
 - ix) Kshs.21,681.40/= being service pay.
 - x) Kshs.193,550.52/= being compensation for unfair termination at the rate of 12 months gross salary in terms of section 49(1)(c) of the employment act of the Laws of Kenya
- c) A certificate of service under Section 51 of the Employment Act, 2007.
- d) Cost of this suit and interest on all the amounts herein until payment in full.
- e) Any other or further relief this Honourable Court may deem fit to grant (pages 6-10 of Appellant's ROA dated 29th May 2025).
18. The Respondent filed her list of witnesses dated 20th February 2023; witness statement of even date; and list of documents of even date with the bundle of documents attached (pages 12ary list of docu-22 of ROA). She later filed a supplementary list and bundle of documents dated 30th March 2023 (pages 23-30 of ROA).
19. The claim was opposed by the Appellant who entered appearance and filed a response to memorandum of claim dated 6th June 2023 (pages 31-35 of ROA). In support of their response, the Appellant filed a list of witnesses dated 22nd November 2024; witness statement of Rotich Kipkemoi Hoseah of even date; and a list of documents of even date with the bundle of documents attached (pages 38-55 of ROA).
20. To counter the response to claim, the Respondent filed a response dated 6th August 2023 (pages 36-37 of ROA).
21. The Claimant/Respondent's case was heard on 30th January 2025, with the Claimant testifying, relying on her filed witness statement as her evidence in chief, and producing her documents as exhibits. She was cross-examined by counsel for the Respondent, Mr. Bosire (pages 151-153 of ROA).
22. The Appellant's case was heard on the same day, with HOSEAH KIPKEMOI ROTICH testifying on their behalf as DW1. He relied on his filed witness statement as his evidence in chief, and produced the Appellant's documents as exhibits. He was cross-examined by counsel for the Claimant/Respondent, Mr. Otieno (pages 153-155 of ROA).
23. The parties took directions on filing of written submissions after the hearing, and complied.



24. The Trial Magistrate Court delivered its judgment on the 5th of April 2025 allowing the Claimant/ Respondent's claims, save for the claim for service pay, with costs of the suit and interest from the date of judgment until payment in full (judgment at pages 135-139 of ROA).

Determination

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

Issues for determination

26. The Appellant, in their submissions dated 13th October 2025, identified the following issues for determination:-
- i. Whether the Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's evidence and as a result arriving at a wholly erroneous decision.
 - ii. Whether the Learned Magistrate erred in law and in fact in finding that the Respondent's termination was unlawful and procedurally unfair.
 - iii. Whether the Learned Magistrate erred in law and in fact in disregarding the Appellant's evidence proving the Respondent deserted work and was issued with a notice to show cause letter however, the said letter did not elicit any response.
 - iv. Whether the Learned Magistrate erred in law and in fact in holding that the Respondent's evidence on unlawful termination was unshaken by the Appellant yet the Respondent had failed to prove that the screenshot of the SMS for termination she produced was sent by the Appellant's supervisor or employee or at all.
 - v. Whether the Learned Magistrate erred in law and fact in making an award of terminal dues in favour of the Respondent notwithstanding that the Claim had not been proved.
27. On his part, the Respondent submitted generally on the grounds of appeal in his submissions dated dated 21st October 2025.
28. The court having perused the grounds of the appeal was of the considered opinion that the issues placed before it for determination in the appeal were –
- a. Whether the trial court erred in fact and /or law in finding there was unfair and unlawful termination.
 - b. Whether the trial court erred in fact and/or law in the reliefs awarded.

Whether the trial court erred in fact and /or law in finding there was unfair and unlawful termination.

29. This was a first appellate court. The Court of Appeal in Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR aptly put out the role of the first appellate court as follows; "We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."



Appellant's Submissions

30. Whether the Learned Trial Magistrate erred in law and in fact in finding that the Respondent's termination was unlawful and procedurally unfair-The Respondent in her statement dated 20th February, 2023 (page 13-14 of the Record of Appeal) and oral testimony (page 151-152 of the Record of Appeal) she averred that she was employed by the Appellant on August, 2019 and worked until 10th October, 2022 when she received a text message from her supervisor by the name Cherotich Chelule telling her not to report to work the following day. The Respondent produced a screenshot of the message which shows that the text message came from one Cherop Du se (page 19 of the Record of Appeal).In cross examination the Respondent acknowledged that she did not have evidence that the person who sent her the alleged message not to report to work is an employee at the Appellant's company and that indeed she is the supervisor she referred as Cherotich Chelule at paragraph 6 of the Memorandum of Claim (page 6 of the Record of Appeal) and paragraph 15 of her statement (page 13 of the Record of Appeal). It's worth to note that the name that appears on the message screen shot produced by the Respondent reads Cherop Du Se and not Cherotich Chelule (page 19 of the Record of Appeal) therefore, cannot be purported to emanate from the Appellant. It is worth noting that the Appellant's Witness in his testimony he averred that the Appellant did not have any employee by the name "Cherop Du se" (page 153 line 20 of the Record of Appeal). Also the Respondent failed to prove before the Trial court who Cherop Du Se is. It is trite law that he who alleges must proof, hence it was the duty of the Respondent to establish before this Trial court the real names of the person who sent her the message not to report to work and having failed to discharge this duty we humbly submit that the Trial court erred in law and fact in relying on the unsupported, unestablished and not proved facts. We also submit that a supervisor did not have the authority to dismiss a fellow employee. Further nothing in her pleadings or evidence at the trial was brought forth to show that the Respondent tried to report to work and was turned away by the Appellant. On the other hand, the Appellant's witness RW-1 in his statement dated 22nd September, 2024 (page 39-41 of the Record of Appeal) and testimony (page 153-155 of the Record of Appeal), he averred that the Respondent received a complaint letter dated 10th October, 2022 from its client, Day Star university where the Respondent was assigned (page 47 of the Record of Appeal). The said client complained that the Respondent was not performing her duties satisfactory, she was always leaving her post unattended and they wanted her transferred with immediate effect. He averred that he informed the Claimant and her supervisor of the complaint vide a letter dated 10th October, 2022 (page 48 of the Record of Appeal), he directed her not report to Day Star university but rather report to the Appellant's office at Dagorreti so that she can explain herself and for further directions. The Appellant's witness RW-1 averred that on 11th October, 2022, the Respondent reported to the office as instructed. After a fruitful deliberation, the Respondent was re-assigned duties to Utalii House Nairobi as that was the available slot. She was issued with a transfer letter dated 11th October, 2022 (page 49 of the Record of Appeal) and she was required to begin her duties effective from 15th October, 2022 and no objection was raised by the Respondent. RW-1 further averred that, the Respondent failed to report to work at Utalii House Nairobi on the agreed date, the supervisor one Dolphine Cherotich had to look for a substitute to stand in for the Respondent as calls went unanswered. Subsequently the Respondent was issued with a notice to show cause dated 31st October, 2022 (page 50 of the Record of Appeal). He also averred that the said notice was served through WhatsApp and the WhatsApp message showed two ticks which indicated that the message was read. However, the said letter did not elicit any response from the Respondent only for the Respondent to show up at the Appellant's office on 13th December, 2022 and informed him that the reason she did not report to her new post is because she found another job, she apologized and requested for a recommendation letter, which she was issued and wished her well only for the Respondent to file the suit herein citing unlawful termination. That in light of the evidence



tendered by the Respondent in the Trial Court, we submit that the Respondent could not ascertain that the said Cherop Du Se who allegedly sent her a message informing her not to report to work and Cherotich Chelule, the Respondent's Supervisor are one and the same person. the Respondent failed to provide the telephone number of the person who sent the message as alleged in the screenshot (page 19 of the Record of Appeal) and in the absence of this crucial evidence, the Trial Court erred in law and fact in making a finding that the Respondent employment was terminated vide an SMS whose sender was not proved in Court (page 137 paragraph 1 line 4-7 of the Record of Appeal). We humbly submit that the SMS extract (Page 19 of the Record of Appeal) produced is governed by Section 64 and 65 of the *Evidence Act*. It is trite law that the document speaks for itself and we invite this Honourable Court to scrutinize the same and Court will find the following; a. That it is not dated 10/10/2022 as alleged in the Respondent's pleadings (page 6 paragraph 6 and Page 13 paragraph 15 of the Record of Appeal) rather it is dated October 12 22.07 (page 19 of Record of Appeal); b. That the sender is one Cherop Du Se; c. That the sender's number is not shown on the said message; and d. That the message is addressed to one Betty and not Beatrice Mboya. In view of the above, it is our submissions that no iota of reason could make someone associate the name Cherop Du Se to be one and the same as Cherotich Chelule. Hence it was not proper for the Learned magistrate to make such an assumption when all the factors raised herein above cast doubt as to whether the said message was sent by Mrs. Cherotich Chelule or not. It is also worth to note that the Respondent stated in her testimony that she is working and employed at the said Daystar University (page 152 of the Record of Appeal), this is clear evidence that the Respondent was in cahoots with the said institution and had no intention of reporting at Utalii House where she was re-deployed as she had secured a job at the said Daystar University. In view of the above it is clear that the Respondent was never terminated hence the reason there is no termination letter on record but rather she deserted work after she was re-assigned. The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the *Employment Act*. The section provides that; 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 for the termination of employment or wrongful dismissal shall rest on the employer. The above mentioned provision is amply clear that the burden of proving that unfair termination or wrongful dismissal of employment has occurred lies on the employee. This burden does not shift as the burden to justify the grounds of dismissal rests on the employer. The Respondent in her pleadings and testimony alleged that she was terminated on 10th October, 2022 however she did not produce any letter of termination or any cogent evidence that she was terminated. We therefore submit that the Respondent was never terminated but rather deserted employment after securing employment in another institution as per the evidence tendered in Court. It is trite law that he who alleges must prove, the burden was on the Respondent to prove that he was unlawfully and unfairly terminated by the Appellant and she failed to do so. We rely in the case of Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR the Court held; - "Whereas we appreciate that the *employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim." In view of the above we submit that the Appellant gave the Respondent a chance to earn a living however, the Respondent took advantage of the Appellant's, generosity by willfully absconding duty. The claimant deserted employment only for the Appellant to be served with pleadings citing unlawful termination. Thus, in view of the above reasons, we submit that the Appellant was not in breach of any provision under the Act relating to employment contract and we urge the this Honourable Court to allow the Appeal herein as prayed. We rely in the case of Joseph Njoroge Vs Summer Limited Cause No. 37 of 2012 where the Court held that; 47".....the Claimant absconded duties and his services became summarily terminated by operation of the law on 21st September, 2011 when he demanded payment of his terminal dues thereby



evidencing his intention not to return to the Respondent's employment..." In view of the foregoing it is therefore our submission that the Respondent did not satisfy the threshold under Section 47(5) Of the *Employment Act* that she was unfairly and unprocedurally summarily dismissed. We rely in the case of Daniel Mueke Vs Bhogals Auto World Cause No. 65 of 2014 where the court held that; - "..... By leaving the work station and not returning, the Claimant repudiated his employment contract. He was in breach of contract. The Claimant abandoned work. The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the *Employment Act*, 2007. We also rely on the case of Hezron Ngaira Sereuwa v Pemwe Services Limited [2021] KEELRC 87 (KLR) where Hon. A. N Makau held that; - "The Respondent did not owe the Claimant a higher duty than the Claimant owed to himself to report to work. Quite often when an employee absconds work, the employer is not duty bound to look for the employee as the employee cannot be forced to come to work. The requisition to compel attendance issued by the Respondent clearly shows and confirms the Claimant was to report back on Monday 1st August 2016 but he failed to do so and as such his claim lacks merit and is accordingly dismissed." In light of our submissions hereinabove, we submit that the Respondent deserted employment without notice to the Appellant and she had no intentions of returning to work as she had already secured employment in another institution, hence we humbly urge this Honourable Court to set aside the declaration that the Respondent was unlawfully terminated and unfairly terminated by the Appellant.

Respondent's submissions

31. Whether the respondent deserted duty and the applicant produced evidence to prove their case against the respondent- the documents which were adduced by the appellant in the subordinate court were never served upon the respondent but were merely attached in their list of documents (see record of appeal at pages 47-50). These documents were: leave posts unmanned, poor performance, a transfer letter, and a show-cause notice for absconding from work. They were attached for the sake of their case, but failed to prove how they were served upon the respondent during the trial. The Learned Trial Magistrate could not rely on them. Nevertheless, they were filed in court to mislead the court that the appellant complied with the process of fair termination. During cross-examination, the appellant's witness, DW-1, stated that he sent the evidence via WhatsApp (see the record of appeal at pages 138 and 154). However, he did not have proof of this since he lost the phone he was using, but he believed the respondent received the messages because he saw the "2 blue ticks". He did not have the proof of them whatsoever. The respondent was never served with a show cause letter through WhatsApp. Under the Section 107(1) of the *Evidence Act*-Chapter 80 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. The Appellant failed in the subordinate court to show that the documents they relied on were ever served upon the respondent, they were merely attached in their list of documents. Failure to show court how the documents were served upon the respondent was the failure of the appellant during trial hearing. The appellant cannot default Learned Trial 4 Magistrate for their failure to demonstrate that indeed the documents were ever served on the respondent. 8. The appellant cannot say that the Learned Trial Magistrate erred in law and in fact in disregarding their evidence and as a result arriving at a wholly erroneous decision. It was the appellant's fault for attaching manufactured documents and wanted the Learned Trial Magistrate to rely on them. During the trial hearing, the appellant had a corresponding duty to prove to the court that the alleged documents existed per the rules of trial by simply demonstrating that they were served upon the respondent; the appellant failed flat on this simple demand. We leave it to the court to find that the appellant did not, in the first place, have genuine documents; secondly, they never served the respondent with the purported documents. In short, the appellant's documents failed the test of validity in the hearing. The respondent proof her case on balance of probability in the subordinate court that she was terminated



via message (see record of appeal at pages 13 and 15 and 138). The respondent demonstrated that she was unlawfully terminated by adducing the SMS message she received from her supervisor. From the SMS message and the time, it was sent, it is clear that the same did not give any reasons or explanation for the drastic action taken against the respondent. The respondent was on duty prior to the text being sent, the alleged misconduct and complaints were not brought to her attention of the respondent prior to her termination. The appellant witness DW-1 acknowledged that the respondent was instructed not to go to work via the text message sent to her phone and went further to admit that he is the one who gave instructions to the respondent's supervisor to send the text to the respondent (see record of appeal at page 138 and 154). We leave it for the court to find that the respondent was terminated via a phone message in the dead of the night. The guiding provisions as to what constitutes fair dismissal are contained in Section 45 of the Employment Act, which states: (1) No employer shall terminate the employment of an employee unfairly. (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 5 (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure. The Appellant never complied with the above-mentioned authorities when the respondent was terminated. We leave it for the court to find so.

32. Whether the respondent deserted work and was issued with a notice to show cause letter however, the said letter did not elicit any response from the respondent- It will be noted that the appellant departed from their pleadings and alleged that the respondent deserted duty after the respondent was served with show cause letter which they failed to prove how the respondent was served (see record of appeal at page 138). Mere attachment of documents does not prove that the procedure was followed. The appellant could not prove that the alleged documents were ever served upon the respondent. The issue of desertion was misleading to the court on the ground that it was based on the show cause letter, which was never served upon the respondent. The court disregarded that line of argument in toto (see record of appeal at page 138). Mere listing of manufactured documents in their list of documents is not enough. The maker of the purported documents ought to have proved that they existed, not leaving court to guess whether they were properly evidence to be relied on by the court. Leave it for the court to find so. In the case of *William Gituma Gateere v RAA Limited* [2020] KEELRC 793 (KLR) it was held that Further in the case of *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR, the court held that – For the benefit of litigants, the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the 6 employee, duration of absence, impact of the absence and nature of employee's duties. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for now. The Court has perused the appointment letter dated 10 January 2012. It did not provide for a fixed-term contract which would be renewed on expiry. It was in the nature of what is loosely referred to as permanent employment. The Respondent could not purport not renew the contract which was not a fixed term contract. To bring it to an end, it was duty bound to give one month written notice or pay in lieu of notice. No notice was given and no pay in lieu was offered.” In the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the court held that – “Desertion of Duty or Unlawful Termination. In its Reply to the



Claimant's claim, the Respondent states that the Claimant himself deserted duty after being involved in several instances of gross misconduct. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR). In his testimony before the Court, the Respondent's Workshop Supervisor, John Omenda Oloo accused the Claimant of careless performance of duty and reporting for duty while intoxicated. When put under cross examination, Oloo stated that the Claimant was terminated on account of poor performance. With these conflicting accounts by the Respondent, the Court was unable to identify a specific reason for the termination of the Claimant's employment. At any rate, none of the grounds were established at the shop floor and the ensuing termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation." 7 Further in the case of *Chiguba Zuma Chiguba v Njuca Consolidated Company Limited* [2018] eKLR, the court held that – "Desertion of Duty or Unlawful Termination 8. The Claimant told the Court that his employment was terminated after he reported an attempted theft at his assignment site. In its Reply, the Respondent admits that there had been incidents of theft at the site but states that the Claimant deserted duty on the heels of reassignment of duty. 9. Desertion of duty is a serious offence which may attract summary dismissal. It must however be proved. The Court was referred to the decision in *James Ashiemi Namayi v Menengai Oil Refineries Ltd* [2016] eKLR where my brother, Radido J. held that an employer relying on desertion as a ground for termination of employment, must demonstrate attempts made to reach out to the employee, to establish their whereabouts. This is the legal position as I understand it. It is therefore not enough for an employer to simply state that an employee has deserted duty. 10. In the instant case, the Respondent did not show any attempts made to reach out to the Claimant with a view to establishing why he had not reported to work. In light of this, the Court rejects the Respondent's line of defence and thereby adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated. It is not enough for an employer to say an employee has deserted duty and do nothing about it, as was the testimony of RW1, who, in reexamination, stated, "we cannot force someone to come back if he walks away." The employer cannot be an observer or sit on the fence where an employee commits any act of misconduct. The law permits, and requires, an employer to take action and bring the matter to a close. I find that the respondent failed to accord the claimant a hearing in the manner provided under Section 41 of the *Employment Act*. Further, the respondent failed to prove that it actually asked the claimant to explain about the broken seal of the fuel tank as no evidence was produced of the same. This is an explanation that should have been sought in writing and the claimant required to respond to in writing for record purposes. For the foregoing reasons I find the termination of the claimant's employment unfair both substantively for want of proof of reason for termination, as well as procedurally, for failure of fair procedure. In the case of *Evans Ochieng Oluoch-vs-Njimia Pharmaceuticals Limited* [2016] eKLR) the court held that; "Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground- is under consideration" We submitted in the subordinate court that the appellant alleged that the respondent deserted duty amounted to an afterthought. There was no iota of evidence placed before the court that appellant made efforts to reach out to the respondent after. Indeed, there was no post, email, phone calls, colleagues, neighbors or family members to demonstrate effort to reach out to the respondent. The desertion remained mere allegation. We still leave it for the



court to find so. The respondent proved her termination on the balance of probabilities, by phone message, not by deserting duty.

Decision

33. 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).
34. The claimant produced a WhatsApp message dated 12th October 2022 by Cherup Du Se, who informed her not to report to work the next day(page 19 of ROA). The respondent denied terminating her services and asserted that she refused to report to the assigned post after issues at Daystar on 10th October 2022.

During cross-examination, the witness for the appellant told the trial court as follows-‘It is true she was instructed not to report to work via text message . I asked the supervisor to inform her by phone. I am the one who instructed the supervisor to inform the claimant of the development...” The trial court based on the admission found the termination was unlawful and unfair. I find no need to delve further on the matter, the witness of the appellant having admitted as above. The termination was without disclosure of reasons or procedural fairness. I find no basis to interfere with the trial court’s finding.

Whether the trial court erred in fact and/or law in the reliefs awarded.

35. The one-month salary notice payment is due on account of procedural unfairness and is upheld.
36. On the claim for underpayment, the respondent said she was paid Khs. 9,900 per month. The appellant did not provide evidence to the contrary. The trial court applied the applicable Wage Orders and awarded the pay difference. I find no basis to interfere.
37. On the overtime claim, the appellant in response did not state hours of work, while the respondent had stated she worked from 5.30 am to 5.30 pm. I find no basis to interfere with the award for overtime, as the employee is to work 52 hours per week, with any additional hours paid as overtime.
38. On the claim for public holidays and rest days. I was persuaded that it was not possible that the respondent worked on all public holidays for the entire duration of employment, and for the non-specificity, I set aside the award.
39. On the claim for Leave- the court, on perusal of documents before the trial court, found the leave awarded by the appellant in 2022 was for maternity. The annual leave was due and is upheld.
40. The award for housing is upheld as it was due under section 31 of the *Employment Act* and the wages paid were held as underpayment.



41. Compensation was awarded for 3 months - the claimant had worked from 2019 to 2022. I find the same was justified, taking into account the period of service and lack of a valid reason for the termination (section 49(4) of the Employment Act on applicable factors in determination of compensation)
42. The NSSF award is upheld. The amount was deducted and not remitted.(Mbogo h Shah)

Conclusion

43. Appeal is successful partially. The Judgment and Decree of the Hon. B. Ojoo (CM) delivered on 5th April 2025 in Mavoko MCELRC No. E013 of 2023 is set aside and substituted as follows-
 - a. A declaration that the termination was unlawful and unfair
 - b. Notice pay Kshs. 16,129.21.
 - c. Compensation equivalent of 3 months' salary Kshs. 48,387
 - d. Underpayment 179,299.74
 - e. Unpaid house allowance – Kshs. 53,947.77
 - f. Unpaid overtime Kshs. 382,200
 - g. Untaken annual leave Kshs 17929.12
 - h. Unremitted NSSF -400
 - i. Total award Kshs. 698,292.83 is payable with interest from the date of judgment
 - j. Costs of the suit.
44. The appellant is awarded ½ the costs of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Kerubo h/b Bosire

Respondent – Otieno

