



**Hunter Profile Limited v Herbert (Appeal E010 of 2024)
[2026] KEELRC 347 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E010 OF 2024
JW KELI, J
FEBRUARY 6, 2026**

BETWEEN

HUNTER PROFILE LIMITED APPELLANT

AND

SAINA REYNOLD HERBERT RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. E.K. Suter
(PM) delivered on 23rd May 2024 in Mavoko MCELRC No. 1 of 202)*

JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. E K Suter (PM) delivered on 23rd May 2024 in Mavoko MCELRC No. 1 of 2022 filed a Memorandum of Appeal dated the 11th of June 2024 seeking the following orders: -
 - a. The Appeal be allowed.
 - b. The judgment delivered on 23rd May 2024 be set aside and the Honourable Court do make a finding in favour of the Appellant.
 - c. The costs of this Appeal be borne by the Respondent.

Grounds of the Appeal

2. The Honourable Magistrate erred and misdirected herself on the law and principles relating to the burden of proof.
3. The Honourable Magistrate erred by holding that the Respondent herein had proved his case.



4. The Honourable Magistrate erred in law and in fact by taking into account extraneous matters and ignored the evidence tendered by the Appellant and the Appellant is aggrieved by the same and intends to pursue the appeal.
5. The Honourable Magistrate erred in law and in fact by disregarding and misconstruing the evidence laid out in support of the Memorandum in Reply.
6. The resulting judgment reflected only one side of the matter wherein substantive justice was not done.
7. The Honourable Magistrate erred in fact and in law by holding that the claimant was unlawfully terminated from employment when there was compelling evidence that the Respondent had absconded from work and had claimed constructive dismissal.
8. The Honourable Magistrate erred in finding that the Respondent was not subjected to a disciplinary process.
9. The Honourable Magistrate erred in law and in fact by awarding excessive damages to the Respondent.
10. The Honourable Magistrate erred in law and in fact by allowing the Respondent's claim as prayed and by awarding the Respondent remedies that were not legally available.
11. The Honourable Magistrate erred in law and in fact by disregarding and misconstruing the evidence laid out by the Appellant and its submissions.

Background to the Appeal

12. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 10th November 2019 seeking the following orders: -
 - a. A declaration that the Respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded above.
 - c. An order for the Respondent to pay the Claimant his due terminal benefits totaling Kshs. 1,235,500.00
 - d. Interest on (c) above from the date of filing suit until payment in full.
 - e. A declaration that the Respondents issue the Claimant with a certificate of service.
 - f. Costs of the suit.(pages 5-8 of Appellant's ROA dated 6th December 2024).
13. The Respondent filed his witness statement dated 9th November 2019; list of witnesses dated 9th June 2021; and list of documents of even date with the bundle of documents attached (pages 11-21 of ROA).
14. The claim was opposed by the Appellant who entered appearance and filed a memorandum in reply dated 21st April 2021 (pages 22-24 of ROA). In support of their response, the Appellant filed a list of witnesses dated 21st April 2021; witness statement of Gerald Nyaga Njue dated 17th September 2021; and a list of documents dated 21st April 2021 with the bundle of documents attached (pages 28-42 of ROA).



15. The Claimants/Respondent's case was heard on the 18th of October 2023 with the Claimant/Respondent testifying. He relied on his filed witness statement as his evidence in chief and produced the documents attached to the Claimants' list of documents as exhibits. He was cross-examined by counsel for the Appellant, Mr. Muhia (pages 5-7 of Supplementary ROA dated 16th July 2025).
16. The Appellant's case was heard on 12th February 2024 with the Appellant calling one witness: Gerald Nyaga Njue. He relied on his filed witness statements as his evidence in chief, and produced the Appellant's documents attached to their list of documents as aforesaid. The witness was cross-examined by counsel for the Respondent Mr. Emirundu (pages 9-12 of Supplementary ROA).
17. The parties took directions on filing of written submissions after the hearing, and complied.
18. The Trial Magistrate Court delivered its judgment on the 23rd of March 2024 partially allowing the Claimant/Respondent's claims to the tune of Kshs. 535,000/- comprising of one month's salary in lieu of notice; compensation and unpaid leave; plus costs of the suit (judgment at pages 66-71 of ROA).

Determination

19. The appeal was canvassed by way of written submissions. Only the Appellant complied.

Issues for determination

20. The Appellant, in their submissions dated 1st October 2025, identified the following issues for determination:
 - i. Whether due process was followed.
 - ii. Whether the Respondent is entitled to the orders sought.
21. 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."

Whether Due Process Was Followed.

Appellant's Submissions

22. We invite you to look at the Demand and Notice Letter dated 26th August 2019 and paragraph 6 of the Memorandum of Claim dated 10th November 2019. On the said letter and the Memorandum of Claim, the Respondent avers that the constant threatening to dismiss him from employment amounted to constructive summary dismissal. the court defined constructive dismissal in the case of *Nathan Ogada Atiagaga versus David Engineering Limited* (2015) eKLR, as follows:

"Constructive dismissal, occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination.



For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge."

23. From the above definition, It is not proper that rules of natural, procedural, and substantive justice under Sections 41, 43 and 45 of the Employment Act 2007 are imported into this scenario whereby the Claimant has been all along acting insubordinate to his superiors and on several occasions being issued with warning letters yet purport to resign so as to have his day in Court claiming for constructive dismissal. The Court of Appeal in Coca Cola East and Central Africa Limited versus Maria Kagai Ligaga, (2015) eKLR, set out the legal principles for determining constructive termination and the principles are as follows:-

- a. What are the fundamental or essential terms of the contract of employment
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intendsto be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e.,causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee."
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied."

24. The Honourable Court went on to state that "For constructive dismissal to be inferred, the employee must have resigned within reasonable time from his employment, with or without notice as a result of the employer's hostile treatment or hostile working conditions at his workplace. The employer must also not have expressed the desire to terminate the employee. It is our humble submissions that the Respondent resigned after the alleged 'constant threats' by the Appellant. The Respondent was issued with several warning letters to give him a chance to rectify his behaviours, but his conduct did not improve. In the case of Danish Jalang'o & Another vs. Amicabre Travel Services Limited (*supra*) the Employment and Labour Relations Court in Paragraph 25 of its Judgment held as follows: In Industrial Court of Kenya Cause Number 635 of 2010 between Dede Esi Annie Amanor- Wilks v. Actionaid International [2014] eKLR, the Court upheld employs-incompatibility as a fair termination reason, observing that Employers generally are entitled to have harmonious working relationships in their Organizations, and can do so by weeding out trouble-makers, eccentrics, and disruptive employees from their Organization. Employers are required to show that they gave such Employees



the chance to explain or rectify the incompatible behaviour. The 1st Claimant was given such a chance but did not reform. He remained volcanic of disposition. The Respondent had valid and fair reason to dismiss the 1st Claimant from employment. (Emphasis ours) It therefore follows that indeed the Appellant did not unfairly terminate the services of the Respondent but rather the Respondent resigned on his own volition when he could not keep up with the standards of the Appellant.

Decision

25. On the ground of appeal that -the Honourable Magistrate erred in fact and in law by holding that the claimant was unlawfully terminated from employment when there was compelling evidence that the Respondent had absconded from work and had claimed constructive dismissal. The appellant submitted heavily on this ground. The claimant in claim paragraph 6 stated -

“it is the claimant’s contention that the respondent’s actions of suddenly ordering him out of the premises amounted to constructive dismissal, was unlawful and unprocedural and offended the provisions of the Constitution of Kenya, the Employment Act 2007, the tenets of fair labour practices and the principles of natural justice.”

26. The trial court of found the claim was not of constructive dismissal but unlawful termination. The court found that the word constructive dismissal was qualified in paragraph 6 of the claim, cited above, as the claimant substantiated his grievance to be dismissal. Section 20 of the Employment Act provides that the court will not determine matters on technicalities. In paragraph 8 of the claim, the claimant stated that as a result of the abrupt, unfair, and wrongful termination of his employment, he suffered loss of income ... and sought compensation. The prayers in the claim were for unfair dismissal and not constructive dismissal. I find no reason to fault the trial court on proceeding on the basis of unfair dismissal.

27. The appellant in response stated that the claimant absconded work and refused to return. The appellant’s witness statement of Njue dated 17th September 2021 stated that the claimant had been issued with several warnings and produced samples. Njue stated that the claimant was accused of absconding work, smelling alcohol at work and despite being issued with warning did not change. Njue said it was on the basis of the behaviour that the claimant was summarily dismissed. The claimant said he was dismissed on 6th September 2018. The last warning letter was dated 5th September 2018 thus he was dismissed the second day after the last warning letter. The appellant thus admitted to the summary dismissal. The defence of absconding was thus not true. An employee in the circumstances of the claimant/respondent could not have been said to have absconded. An employee who has absconded from work leaves with no intention of returning. The respondent was in service when they were issued with the summary dismissal. There was no procedural fairness before the summary dismissal as required under section 41(2) of the Employment Act to wit-

“2) Notwithstanding any other provision of this Part, 47 the Employment Act, 2007 an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection(1) make.”

I find no basis to interfere with finding of unfair termination by trial court.



Whether the Trial Court Erred in Reliefs Granted.

28. The Trial Magistrate Court delivered its judgment on the 23rd of March 2024 partially allowing the Claimant/Respondent's claims to the tune of Kshs. 535,000/- comprising of one month's salary in lieu of notice; compensation and unpaid leave; plus costs of the suit (judgment at pages 66-71 of ROA).
29. Notice pay of 1 month's salary is upheld by the court, having found a lack of procedural fairness in the summary dismissal. Notice pay of Kshs. 40,000 upheld.
30. Compensation was awarded equivalent to 8 months. The claimant had worked for 6 years, and the trial court indicated it applied section 49(4) of the *Employment Act*. During the hearing, the claimant denied receiving the warning letters regarding being drunk at work and told the court that, when he was absent, he had been issued with verbal permission by the accountant. The circumstances of interference with the discretion of the trial court are as stated in *Mbogo v Shab*. The claimant was awarded compensation equivalent for 8 months' salary, having worked 6 years, and dismissed without a justifiable reason or procedural fairness. I find no basis to interfere with the award.
31. Leave pay- the court awarded the claimant leave for entire service. In the judgment, the trial court indicated the appellant told the court the claimant never applied for leave. Section 28(4) of the *Employment Act* limits the days that an employee can carry forward as annual leave as follows-

“28 (4) The uninterrupted part of the annual leave with pay referred to in subsection(3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose applied.”

The appellant could only carry forward annual leave days amounting to 18 months. The award for leave is set aside and substituted with pay for 18 months of leave days, thus Kshs. 60,000.-

Conclusion

32. The appeal is allowed partially. The Judgment and Decree of the Hon. EK Suter (PM) delivered on 23rd May 2024 in Mavoko MCELRC No. 1 of 2022 is set aside and substitute as follows-
 - a. A declaration that the respondent's dismissal of the claimant from employment was unfair and unlawful,
 - b. One Month's salary in lieu of notice Ksh. 40,000
 - c. Compensation Ksh. 320,000
 - d. Unpaid annual leave Kshs. 60,000
 - e. Total sum award above Kshs. 420,000 (B and C) is payable with interest at court rate from date of judgment.
 - f. Certificate of service to issue within 30 days of the judgment.
 - g. The claimant is awarded costs of this suit
33. The appeal was partially successful on remedies only. The Appellant is awarded ½ costs.



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 – absent.

Respondent – Mwanyangu h/b Namada.

