



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E070 OF 2025

BRIAN MASIKA.....

....**APPELLANT**

VERSUS

FARGO COURIER LTD.....

.....**RESPONDENT**

(Being an appeal from the judgment and decree of Hon. V. Adhiambo in Kisumu CMEELRC No. 130 of 2024 delivered on 22nd July 2025)

JUDGMENT

1. This appeal arises from the Judgment of Hon. V. Adhiambo (Ms.) delivered on 22nd July 2025 in **Kisumu CMEELRC No. 130 of 2024, Brian Masika Wanjala v Fargo Courier Ltd.** Aggrieved by that decision, the Appellant filed a

Memorandum of Appeal dated 21st August 2025 setting out the following grounds:

- (a) *That the Learned Magistrate erred in law in finding that the resignation of an employee is key to prove constructive dismissal.*
- (b) *That the Learned Magistrate erred in law by ignoring the binding Court of Appeal decision relied on by the Appellant setting out the principles applicable in determining constructive dismissal of employment.*
- (c) *That the Learned Magistrate erred in law by ignoring the Appellant's submissions and evidence on the principles applicable in determining constructive dismissal of employment.*
- (d) *That the Learned Magistrate misdirected herself on the principles applicable in constructive dismissal and thereby erred in law by failing to award the Appellant the prayers he sought as against the Respondent for constructive dismissal of the Appellants employment.*

(e) *That the Learned Magistrate erred in law by failing to exercise her discretion judicially.*

2. On the basis of these grounds, the Appellant urges this Court to set aside the Trial Court's judgment and to substitute it with a declaration that he was constructively dismissed. He further seeks an order compelling payment of the sums pleaded before the Trial Court, together with costs of both the appeal and before the Trial Court.
3. Directions were issued on 15th December 2025 requiring the Appellant to file and serve submissions within twenty-one (21) days, after which the Respondent was to file its submissions within a further twenty-one (21) days. Notwithstanding those directions, neither party has filed submissions.

Disposition

4. This being a first appeal, I am obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at my own conclusion. This principle of law was enunciated in the

celebrated case of **Selle v Associated Motor Boat Co. Ltd** [1968] EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

[Emphasis supplied]

5. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

6. The issue for this Court to determine is whether the Appellant was dismissed from employment or if he deserted his employment. If a dismissal occurred, the Court will have to determine whether the Respondent followed the law in the said dismissal. The facts of the case as discerned was that the Appellant was employed as a courier escort. He sought a one week leave in April 2024. He admittedly did not resume work and was contacted by the Respondent. He gave his reason for not resuming as having received a termination letter. The termination letter gave the reason for termination as desertion.

7. The facts of this case mirror a case cited before the Learned Magistrate. The case of **Lear Shighadi Sinoya v Avtech Systems Limited [2017] KEELRC 347 (KLR)** held as follows:-

The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the Employment Act as a

matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised.

8. The Court agrees that the Appellant ought to have resigned if indeed the Respondent had created a set of circumstances that made his stay at the Respondent untenable in order for constructive dismissal to apply. The Appellant failed to demonstrate how his dismissal for alleged desertion was constructive dismissal. In my considered view, the Appellant was the one at fault by deserting his employ. He even left his work with the blessing of the Respondent who permitted his off days only for the Appellant never to resume work prompting the Respondent to dismiss the Appellant for desertion. Failure to attend work is deemed to be gross misconduct under section 44 of the Employment Act and the employer was entitled to effect a summary dismissal as the refusal of the Appellant to report to work was sufficient to

found such action. I therefore find there was no proof laid before the Trial Magistrate for a determination that was any different as will be evident shortly. Appeal is dismissed albeit with no order as to costs since the Appellant failed to prove his case on a balance of probabilities.

It is so ordered.

Dated and delivered at Kisumu this 17th day of February

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**

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