



**Progressive Credit Limited v Onyango (Appeal E067 of 2025)
[2026] KEELRC 402 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 402 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E067 OF 2025
NZIOKI WA MAKAU, J
FEBRUARY 19, 2026**

BETWEEN

PROGRESSIVE CREDIT LIMITED APPELLANT

AND

DUNCAN OPONDO ONYANGO RESPONDENT

*(Being an appeal from the judgment and decree of Hon. F.M. Rashid
(PM) in Kisumu CMELRC No. E182 of 2024 delivered on 16th July 2025)*

JUDGMENT

1. This appeal arises from the Judgment of Hon. F.M. Rashid (PM) delivered on 16th July 2025 in Kisumu CMELRC No. E182 of 2024, Duncan Opondo Onyango v Progressive Credit Ltd. Aggrieved by that decision, the Appellant filed a Memorandum of Appeal dated 14th August 2025 setting out the following grounds:
 - a. That the Learned Magistrate erred in law and fact by finding that the Respondent was unfairly terminated despite irrefutable evidence that he had extorted money from clients and absconded from work. Furthermore, that the Appellant followed the procedure for termination being issuance of a Notice to Show Cause, which the Respondent failed to honour, before termination.
 - b. That the Learned Magistrate erred in law and fact by awarding damages to the Respondent for unfair compensation under various heads yet the evidence on record showed that the termination complied with both substantive and procedural requirements.
 - c. That the Learned Magistrate erred in law and fact by making a finding that the Respondent was not paid house allowance and thereby awarded housing allowance yet there was evidence that the subject salary was consolidated.



- d. That the Learned Magistrate erred in law and fact by awarding the Respondent maximum compensation for unfair termination despite irrefutable proof that the Respondent's own acts led to his termination.
 - e. That the Learned Magistrate erred in law and fact by awarding costs to the Respondent yet there was evidence the Respondent greatly contributed to his termination and that the claim was not merited in its entirety.
 - f. That the Learned Magistrate erred in law and fact by making a finding contrary to express provisions of the applicable principles of law.
 - g. That the Learned Magistrate erred in law in making a finding that was bereft of any legal and statutory basis at all.
2. On the basis of these grounds, the Appellant urges this Court to allow the appeal, set aside the judgment of the trial court, and substitute it with an order dismissing the suit with costs. It also seeks costs of the appeal and any other appropriate relief.
 3. On his part the Respondent lodged a memorandum of cross appeal dated 28th August 2025 raising the following grounds:
 - i. That the Learned Trial Magistrate erred in Law and fact in disregarding that the Respondent was entitled to 21 working days annual leave for every 12 consecutive months of service.
 - ii. That the Learned Trial Magistrate erred in Law and fact in disallowing the prayer for Annual leave.
 4. He therefore asks the Court to allow the cross-appeal, review the judgment accordingly, and award him costs.
 5. The appeal was canvassed by way of written submissions.

Appellant's Submissions

6. The Appellant urges the Court to be guided by its duty as a first appellate court to reconsider and re-evaluate the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses first hand, citing *Ng'ang'a v Matheri* (Civil Appeal 131 of 2023) [2024] KEHC 6713 (KLR). It identifies three issues for determination:
 - a. Whether the Respondent was unfairly terminated from employment;
 - b. Whether the Respondent was entitled to the orders granted; and
 - c. Whether the appeal should be allowed.
7. On the issue of termination, the Appellant submits that the Respondent failed to prove that his dismissal was unfair. It submits that the termination was lawful because the Respondent absconded duty and failed to respond to a Notice to Show Cause dated 3rd April 2024. It draws the Court's attention to the fact that the Respondent failed to report to his new station in Nakuru on 2nd April 2025. In support of this position the Appellant cites the case of *GMK v Kenyatta National Hospital* [2020] KEELRC 1157 (KLR), where it was held that failure to turn up for work without notice or reasons, constituted abscondment, provided there is proof that the employer tried to reach out to the employee. It also contends that the claim did not meet the threshold for constructive dismissal, as the Respondent did not resign. In support of this position, it cites the case of *Kenya Union of Sugarcane*



Plantation and Allied Workers v Othira (Appeal E005 of 2023) [2024] KEELRC 843 (KLR) (18 April 2024) (Judgment).

8. Regarding the reliefs awarded, the Appellant submits that the award of twelve months' salary as compensation was unjustified. It asserts that the Respondent's own conduct, of extorting clients and failing to give notice under clause 11.1 of the employment contract, are what resulted in his termination of employment. Regarding house allowance, the Appellant submitted that the Respondent's salary was consolidated. It submits that a finding to the contrary amounts to rewriting the contract between the parties. In support of its position, it relies on *Vipingo Ridge Limited v Swalehe Ng'onge Mpitta* [2022] KEELRC 309 (KLR), for the proposition that a consolidated salary includes house allowance unless proved by the employee. It also cites the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (Civil Appeal 95 of 1999) [2001] KECA 362 (KLR) (8 June 2001) (Judgment), for the argument that in the presence of an undisputed contract between parties the court should resist invitation to rewrite the terms of the agreement. On the question of pay in lieu of notice, the Appellant submits that the Respondent absconded duty without notice and was therefore not entitled to notice pay. It accordingly urges the Court to allow the appeal with costs.

Respondent's Submissions

9. The Respondent identifies three issues for determination:
 - i. Whether the appeal is merited;
 - ii. Whether the cross-appeal is merited; and
 - iii. Who should bear costs.
10. On the appeal proper, the Respondent submits that his termination was both procedurally and substantively unfair. He asserts that the Appellant informed its clients that he was no longer its employee before issuing the Notice to Show Cause. He thus submits that the notice was an afterthought intended to justify an unfair labour practice. He further submits that his login credentials were disabled, preventing him from performing his duties. He submitted that section 41 of the *Employment Act* was not complied with, as he was not accorded a hearing. He relies on the case of *Milkah Khakayi Kulati v Sandstorm Africa Limited* [2013] KEELRC 843 (KLR) and the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] KEELRC 386 (KLR), in which the termination of employment was deemed unfair due to failure to adhere to the procedure in section 41 of the *Employment Act*. He therefore asserts that his dismissal was unfair within the meaning of section 45(2) of the *Employment Act*. On the reliefs, the Respondent submits that the conduct of the Appellant justified the award of maximum compensation. As for house allowance he submits that there was no evidence to show that his salary was consolidated, and therefore the award of house allowance was proper. He cited the case of *Robai Musinzi v Safdar Mohamed Khan* [2012] KEELRC 261 (KLR). On pay in lieu of notice he emphasizes that his termination from employment was without notice hence the trial court rightly awarded the same.
11. In support of the cross-appeal, the Respondent submits that the leave schedule produced did not prove leave taken. He further points out that certain dates such as 6th, 7th, 13th, and 14th January 2023 fell on weekends and should not have been counted as leave days. He submitted that he had a balance of 31 untaken leave days for which he is entitled to payment. On costs, he submits that if the appeal is found to be unmeritorious, he should be awarded costs. In conclusion, the Respondent urges the Court to dismiss the appeal and allow the cross-appeal.



Disposition

12. 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]

13. 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.
14. The issues for this Court must determine are:
- Whether the Respondent was unfairly terminated from employment;
 - Whether the Respondent was entitled to the orders granted;
 - Whether the cross appeal is merited; and
 - What orders should the Court make.
15. The Appellant asserts the process of termination was in accordance with the law and that there was therefore no justification for the grant of the reliefs. The Respondent in his cross appeal asserts the leave schedule did not demonstrate the leave he sought was taken therefore claims the sum in respect of the 31 days of leave he alleges he never took.
16. The determination of this appeal hinges on one thing – section 41 of the *Employment Act*. It has been held time without number that it matters not what an employee is charged with, an employer is required under section 41 of the *Employment Act* to accord an employee a fair hearing. That is the essence of the decision of *Walter Ogal Anuro v Teachers Service Commission* (supra) where Ndolo J. (as she then was) held for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
17. In this case, the Respondent was not taken through a disciplinary hearing. Indeed, as the Learned Magistrate held “even if the allegations were true, the Respondent (Appellant herein) ought to have taken the Claimant (Respondent herein) through a disciplinary hearing. None whatsoever was conducted by the Respondent. The Respondent's assertion that the Claimant did not report to Nakuru are equally not true. At the time he was to report to Nakuru, his credentials had been disabled and clients had been informed not to transact with him. The Respondent's conduct led to the constructive dismissal of the Claimant.” This is ample proof the Learned Magistrate took into account the evidence adduced, gave it weight and contrasted the allegations of desertion and considered the law on termination for misconduct and in my considered view, arrived at the correct conclusion. On the question of house allowance, no agreement has been shown to demonstrate the pay was consolidated. The payslips just have a figure indicated as basic pay and that gives the total of gross pay. There is



nothing on the payslips to show there was any computation of house allowance. The determination of the Learned Magistrate on this score is also sound and cannot be disturbed.

18. This appeal is thus devoid of merit as I find there was wanton disregard for the law in respect to termination of employment on account of misconduct as provided for under section 41 of the [Employment Act](#).
19. On the cross-appeal, the Respondent herein was bound to avail evidence but woefully failed. The fact that his leave form was not signed in approval of his leave does not mean he did not proceed on leave. He did handover notes for the leave days he took and there is doubt he failed to proceed on leave. As such, the determination by the Learned Magistrate on this score is also upheld with the result that both the Appeal and cross-appeal are dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF FEBRUARY 2026

NZIOKI WA MAKAU, MCIARB.

JUDGE

