



REPUBLIC OF KENYA



**Trailink Group Limited v Kioko (Appeal E022 of 2025)
[2026] KEELRC 346 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E022 OF 2025
JW KELI, J
FEBRUARY 6, 2026**

BETWEEN

TRAILINK GROUP LIMITED APPELLANT

AND

SHEDRACK MUTUA KIOKO RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D. Kuto (SPM)
delivered on 10th April 2025 in Mavoko MCELRC No. E082 of 2024)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. D. Kuto (SPM) delivered on 10th April 2025 in Mavoko MCELRC No. E082 of 2024 filed a Memorandum of Appeal dated the 10th of May 2025 seeking the following orders: -
 - a. Allow the appeal.
 - b. Set aside the Judgment/Decree of the Magistrate's Court at Mavoko in MCELRC Case No. E082 of 2024 in its entirety.
 - c. Dismiss the Claimant's suit with costs, or in the alternative, substantially reduce the awards made.
 - d. Award the costs of this appeal and of the lower court to the Appellant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and fact in awarding the Respondent the maximum compensation of 12 months' salary without demonstrating exceptional circumstances to justify such an award, thereby misapplying Section 49(1)(c) of the *Employment Act*.



3. The Honourable Magistrate erred in law and fact in finding that the Respondent's employment was unfairly terminated despite evidence showing desertion of duty and misconduct, contrary to Sections 43 and 45 of the Employment Act;
4. The Honourable Magistrate erred in law and fact by holding that the Claimant was entitled to leave pay without any documentary or testimonial evidence that he never took or was not paid for leave during his years of service.
5. The Honourable Magistrate erred in law and fact in awarding the Respondent outstanding salary for the months of July 2023 to December 2023 despite the Appellant having produced payslips for the said period, thereby disregarding cogent evidence and reaching a finding not supported by the record.
6. The Honourable Magistrate erred in law and fact by relying on the Claimant's bank statement to award alleged outstanding salary, without requiring further proof or considering that the burden lay on the Claimant under Section 47(5) of the Employment Act.
7. The Honourable Magistrate erred in law and fact in shifting the burden of proof to the Appellant, contrary to established principles under the Evidence Act and the Employment Act, thereby reaching a conclusion not supported by evidence.
8. The Honourable Magistrate erred in law and fact by failing to properly evaluate the Respondent's defence and submissions, and by holding that the Claimant had discharged his burden of proof on a balance of probabilities when he had not.
9. The Honourable Magistrate erred in law and fact in rendering a judgment that was against the weight of evidence and contrary to the applicable law.

Background To The Appeal

10. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 5th March 2024 seeking the following orders: -
 - a. 12 Months' Compensation for Unfair/Unlawful/Wrongful Termination @ Kshs 37,200.00 446,400.00
 - b) Leave Pay 37,200.00
 - c) One Months Salary in lieu of a Proper Notice 37,200.00
 - d) Service pay @ 15 days per year for 20 years 372,000.00
 - e) Salary outstanding (July 2023-Dec 2023) 23,200.00
 - f) Certificate of service
 - g) Costs of the cause.
 - h) Interest from the time of filing this cause.
 - i) Any other relief deemed reasonable in the circumstances of this Honourable court deem fit. (pages 6-7 of Appellant's ROA dated 8th September 2025).
11. The Respondent filed her list of witnesses dated 5th March 2024; witness statement of even date; and list of documents of even date with the bundle of documents attached (pages 9-23 of ROA).



12. The claim was opposed by the Appellant who entered appearance and filed a response to the memorandum of claim dated 14th June 2024 (pages 41-43 of ROA). In support of their response, the Appellant filed a list of witnesses dated 18th July 2024; witness statement of Peter Njenga dated 18th July 2024; and a list and bundle of documents dated 18th July 2024 (pages 44-59 of ROA).
13. The case proceeded by way of documents (page 89 of ROA). The parties took directions on filing of written submissions after the hearing, and complied.
14. The Trial Magistrate Court delivered its judgment on the 10th of April 2025 allowing the Claimant/ Respondent's claims, with costs of the suit and interest (judgment at pages 86-93 of ROA).

Determination

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

Issues for determination

16. The Appellant, in their submissions dated 27th November 2025, identified the following issues for determination:
 - i. Whether the learned trial magistrate erred in awarding the Respondent the maximum compensation of 12 months' salary without demonstrating exceptional circumstances to justify the award.
 - ii. Whether the Respondent's employment was unfairly terminated despite evidence showing desertion of duty and misconduct, contrary to section 43 and 45 of the *Employment Act*.
 - iii. Whether the trial magistrate erred in awarding the Respondent outstanding salary for the months of July to December 2023 despite the appellant having produced pay slips for the said period.
 - iv. Whether the trial magistrate erred in holding that the Claimant was entitled to leave pay without any documentary or testimonial evidence that he never took or paid for leave during his years of service.
17. On his part, the Respondent submitted generally on the appeal in his submissions dated 15th December 2025.
18. The court having read the grounds of appeal, was of the considered opinion that the issues placed before the court for determination in the appeal were-
 - a. Whether the trial court erred in fact and in law in finding that the termination of the employment services of the claimant was unlawful and unfair.
 - b. Whether the trial court erred in fact and in law in the reliefs award.

Whether the trial court erred in fact and in law in finding that the termination of the claimant's employment services was unlawful and unfair.

The appellant's submissions

19. Whether the learned trial magistrate erred in awarding the Respondent the maximum compensation of 12 months' salary without demonstrating exceptional circumstances to justify the award. - the Appellant submits that the trial magistrate erred in awarding the Respondent maximum compensation



damages provided for under Section 49 (1) (c) in the absence of exceptional circumstances to warrant such an award. The abovementioned is maximum award and is an exceptional remedy, not the default position. The trial Court ought to have considered the mandatory factors set out in Section 49 (4) of the *Employment Act* which includes the Respondent's length of service, the degree to which the employee contributed to the termination, any previous record of misconduct, the practicability of reinstatement, and the nature of the employee's expectations at the time of termination. In this case; the Respondent absconded duty before the contract lapses and the Claimant still paid his November and December 2023 salary. This conduct demonstrates the Appellant's good faith and also confirms that the Respondent was not unfairly dismissed. Consequently, the Appellant should not be penalised for the Respondent's own breach of his employment obligations. 6. My Lord, in light of the foregoing, we urge this Honourable Court to interfere with the award of 12 months compensation and reduce the same to 7 months. In *Kenneth Kimani Mburu & Another - v- Kibe Muigai Holdings Limited* (2014) eKLR Court awarded five months' salary in damages for unfair constructive dismissal was awarded. Also, in *In Telkom (K) Limited -v- Ericsson Edeyangwa Band*, Nairobi Civil Appeal No. 152 of 2011 as quoted in *Charles Aput Otieno v Telkom Kenya Limited* [2017] KECA 696 (KLR) Court awarded a sum of six months' salary. The above authorities clearly show that the twelve-month award in this matter was disproportionately high and an improper exercise of discretion.

20. Whether the Respondent's employment was unfairly terminated despite evidence showing desertion of duty and misconduct, contrary to section 43 and 45 of the *Employment Act* - The Claimant signed an employment contract dated 21st February 2023 which clearly stated that the Respondent's contract would last for one year ending on 23rd December 2023 and was subject to renewal by the employer. The said contract was part of the Appellant's documents at the trial court and was not opposed by the Respondent's counsel. The Appellant produced valid pay slips from July 2023 to December 2023 in favour of the Respondent. On the other hand, the Respondent did not produce any evidence to rebut not being paid by the Appellant. The Respondent despite having an employment contract in place absconded duty on 27th November 2023 and never went back to work. The Appellant invites this Honourable Court to look at the case of *Joseph Njoroge Kiama vs Summer Ltd* (2014) EKLR where Court held that: "Absenting himself from work for ten days without permission amounted to absconding and the employer was entitled to dismiss him summarily under Section 44 (4) of the *Employment Act*." The Appellant produced evidence showing the Respondent failed to sign in from 27th November 2023 all the way to December 2023 when the contract ended. It is the Appellant's submission that the Respondent was not unfairly terminated.
21. Whether the trial magistrate erred in awarding the Respondent outstanding salary for the months of July to December 2023 despite the appellant having produced pay slips for the said period. 12. My Lord, we humbly submit that the learned trial magistrate erred in awarding the Respondent salary arrears for the period of July to December 2023, notwithstanding the fact that the Appellant produced pays lips (pages 52-55 of the plaint) confirming that the said salaries had been duly paid. The Respondent did not tender any evidence to rebut the Appellant's documentary proof of payment, and in the absence of such evidence, the award of salary arrears was wholly unjustified.
22. Whether the trial magistrate erred in holding that the Claimant was entitled to leave pay without any documentary or testimonial evidence that he never took or paid for leave during his years of service- the Appellant submits that the learned trial magistrate misdirected herself in awarding the Respondent leave pay in the absence of any evidence to support such a claim. It is a well-established principle of law that entitlement to leave pay must be substantiated either through payroll records, leave schedules, or credible testimonial evidence from the parties concerned. In this case, the Appellant maintained complete records of leave taken and leave paid throughout the Respondent's employment. The Respondent did not produce any documentary evidence, nor did he call any witnesses to testify



that he had been denied leave or compensation for leave. Without such proof, the trial court lacked a factual basis to award leave pay. Awarding leave pay in the absence of evidence constitutes an error in law and an improper exercise of judicial discretion. The Appellant therefore respectfully urges this Honourable Court to interfere with the award and set it aside, as it is unsupported by the record and is inequitable.

23. Whether the trial magistrate erred in law and in shifting the burden of proof to the Appellant contrary to the Evidence and Employment Act - Section 107 of the Evidence Act provides that whoever desires a court to give judgment as to a legal right or liability dependent on the existence of facts which they assert, must prove that those facts exist. The trial court completely ignored the evidence attached to the Appellant's defence and failed to evaluate properly the Respondent's defence and submission and therefore holding that the Appellant had discharged his burden of proof on a balance of probabilities when he had not. In addition, my Lord, the Magistrate erred in rendering a judgement that was against the weight of evidence and contrary applicable law. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA334, the Court of Appeal held that: "A general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

The Respondent's submissions

24. Whether the termination of the respondent was unfair- Section 41 of the Employment Act provides for a notification and hearing before termination on grounds of misconduct. An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. An employer shall, before terminating the employment of an employee hear and consider any representations which the employee may on the grounds of misconduct or poor performance. Section 43 of the Employment Act provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. Section 45 of the Employment Act provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid;(b) that the reason for the termination is a fair reason. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, the Court shall consider (a)the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b)the conduct and capability of the employee up to the date of termination; (c)the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate (d)the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e)the existence of any previous warning letters issued to the employee.
- 25 Analysis of the evidence tendered-The alleged employment contract dated 21st February, 2023, lapsing on 23rd December, 2023, was not executed by the Respondent; therefore, it was inadmissible in evidence. (see page 50 of the record of appeal) That was just a typed piece of paper. Paragraph 4 of the Appellant's witness statement dated 18th July, 2024 (see page 45 of the record of appeal) alleged that on 27th November, 2023 the Respondent abandoned his assigned vehicle registration number



KAM 934B and did not return to work. The alleged contract that was to lapse on 23rd December, 2023 had therefore NOT EXPIRED. The payslips alleged by the Appellant are just pieces of paper and not proof of payment. The appellant should have produced bank statement to confirm payment. The Respondent was terminated on 27th November, 2023. The Appellant alleges that the Respondent was stealing from the company according to paragraph 6 of the response to the memorandum of claim. (see page 42 of the record of appeal) This reason was not notified upon the Respondent. The Respondent was also not heard. No evidence was tendered by the Appellant to show that due process was actually followed. The Appellant's witness statement dated 18th July, 2024 indicate that the Respondent abandoned his assigned vehicle and did not return to work. That efforts to contact the Respondent was futile. This is NOT TRUE since the Appellant had the Respondent's contact. Secondly, the Appellant has tendered no evidence that they tried to call, sms or email the Respondent. Immediately the Respondent was terminated he went to seek assistance at the Ministry of Labour and Social Protection. The ministry of Labour and Social Protection wrote a letter to the Appellant dated 5th December, 2023 (see page 13 of the record of appeal). This was exactly eight (8) days after termination. The Appellant never responded to the letter to inform Ministry of Labour and Social Protection of the circumstances surrounding the termination of the Respondent and to recall the Respondent back to work. The Ministry of Labour and Social Protection wrote to the Appellant a letter dated 19th December, 2023 calling them for a conciliation meeting (see page 14 of the record of appeal). The Appellant never attended the meeting. The allegation by the Appellant that the Respondent absconded work and abandoned the truck in the yard on 27th November, 2023 is a falsehood. The Claim that the Respondent was unreachable is also falsehood. The Appellant could have communicated to the ministry of Labour and Social Protection for the Respondent to be reached out. The Appellant also had the Respondent's phone number. The Respondent could not have abandoned the truck at the yard and gone to seek The ministry of Labour and Social Protection intervention. It is evident that the Appellant never issued the Respondent with any warning letter or a certificate of service. In the case of *Asava v Grish Kumar T/A Tejdip Hardware Ltd (Employment and Labour Relations Claim 109 of 2018) [2022] KEELRC 12759 (KLR) (6 October 2022) (Judgment)* it was held that though the Respondents aver that the Claimant absconded duty, there is no evidence that they sought out the Claimant. The Claimant reported a dispute at the labour office and the labour office summoned the Respondent to a meeting on 12/3/2018. If indeed the Claimant had absconded duty the Respondent ought to have served him with a show cause letter and subjected him to a disciplinary hearing for absenteeism. This was never done. The Claimant was thus dismissed from work unfairly and unjustly without establishment of valid reasons and subjecting him to a fair disciplinary process. In the case of *Wangereka v Rupra (Cause 2473 of 2017) [2023] KEELRC 625 (KLR) (16 March 2023) (Judgment)* it was held that the Respondent's testimony that he tried to find out the whereabouts of the Claimant to no avail appeared to me to have been an afterthought. The document contained no plea that the Respondent followed the procedure outlined in law in processing closure of the contract between the parties. Further, even though the Respondent suggests that he tried to get to the Claimant to no avail, there was no cogent evidence of the efforts made in this respect. No evidence of phone call data was availed. No evidence of written communication to the Claimant in the form of a notice to show cause or otherwise was presented to court. Consequently, the Claimant's employment was not terminated in accordance with the requisite procedure. We pray that this court upholds the trial court's determination that the Respondent was unfairly terminated.

Decision

26. 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.”

27. On the issue of whether the termination was lawful and fair- 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).
28. The reason for termination advanced by the respondent was that the respondent abandoned the assigned motor vehicle on 37th November 2024 and failed to return to work. The appellant’s attempts to call him were futile. The respondent said his employment was terminated. No evidence of the attempts to reach the respondent was placed before the court. The procedure to follow in the event of absconding is as per section 41 of the *Employment Act*, which entails reaching the employee through the given contacts, and in this era of technology, includes social media like WhatsApp. The traditional postal service also applies. An employer must keep the employee’s contact details. The alleged attempts to reach the respondent were not proved. The reason for termination was not justified. There was no evidence of notice of show cause having been issued to the respondent . The court found no basis to interfere with the decision of the trial court that the termination did meet the fairness test of both valid reasons and procedural fairness (section 45 of the *Employment Act*).

Whether the trial court erred in fact and in law in the reliefs award.

The appellant’s submissions

29. Whether the trial magistrate erred in awarding the Respondent outstanding salary for the months of July to December 2023 despite the appellant having produced pay slips for the said period. - we humbly submit that the learned trial magistrate erred in awarding the Respondent salary arrears for the period of July to December 2023, notwithstanding the fact that the Appellant produced pays lips (pages 52-55 of the plaint) confirming that the said salaries had been duly paid. The Respondent did not tender any evidence to rebut the Appellant’s documentary proof of payment, and in the absence of such evidence, the award of salary arrears was wholly unjustified.
30. Whether the trial magistrate erred in holding that the Claimant was entitled to leave pay without any documentary or testimonial evidence that he never took or paid for leave during his years of service- The Appellant submits that the learned trial magistrate misdirected herself in awarding the Respondent leave pay in the absence of any evidence to support such a claim. It is a well-established principle of law that entitlement to leave pay must be substantiated either through payroll records,



leave schedules, or credible testimonial evidence from the parties concerned. In this case, the Appellant maintained complete records of leave taken and leave paid throughout the Respondent's employment. The Respondent did not produce any documentary evidence, nor did he call any witnesses to testify that he had been denied leave or compensation for leave. Without such proof, the trial court lacked a factual basis to award leave pay. Awarding leave pay in the absence of evidence constitutes an error in law and an improper exercise of judicial discretion. The Appellant therefore respectfully urges his Honourable Court to interfere with the award and set it aside, as it is unsupported by the record and is inequitable. V. Whether the trial magistrate erred in law and in shifting the burden of proof to the Appellant contrary to the Evidence and *Employment Act*, Section 107 of the *Evidence Act* provides that whoever desires a court to give judgment as to a legal right or liability dependent on the existence of facts which they assert, must prove that those facts exist. The trial court completely ignored the evidence attached to the Appellant's defence and failed to evaluate properly the Respondent's defence and submission and therefore holding that the Appellant had discharged his burden of proof on a balance of probabilities when he had not. In addition, the Magistrate erred in rendering a judgement that was against the weight of evidence and contrary applicable law. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA334, the Court of Appeal held that: "A general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

The respondent's submissions

31. Whether the respondent was entitled to reliefs awarded- Twelve (12) months' salary in Compensation for unfair termination Section 49(1c) of the *Employment Act* provides that where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. section 49 (4) of the Act outlines the factors to be considered being the employee's length of service with the employer, the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination, the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination, the opportunities available to the employee for securing comparable or suitable employment with another employer and failure by the employee to reasonably mitigate the losses attributable to the unjustified termination. The National Social Security Fund account statement with effect from 1st March, 2006 to 31st December, 2023 (see page 12 of the record of appeal) confirms that the employer was the Appellant. The Respondent was employed by the appellant with effect from May, 2003 for twenty (20) years. This averment is not controverted by the Appellant. With this period of service, the Respondent expected to work for the Appellant until retirement. The Respondent tried to mitigate the losses for unjustified termination by going to the Ministry of Labour and Social Protection but the appellant failed to cooperate. Based on the length of service, the Respondent was unable to procure another employment opportunity.

Decision

32. The court awarded maximum compensation on account of long service of 20 years (2003- 2023) and further noted that the respondent was unlikely to get a similar opportunity, having served for that long. The trial court found that the appellant produced only a contract for 2023, not for the previous years, and thus this was not conclusive evidence that the Respondent's contract was coming to an end (contract at page 50 of the ROA). The appellant suggests an award of 7 months instead of the



maximum. The Court of Appeal guided on the role of the Court on appeal in Mbogo V Shah [1968] EA Page 93, where De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.” The court, taking into account that the award was justified by the long period of service and there was no proof of the claimant’s contribution to the termination, finds no basis for disturbing the award, which was compliant with section 49(4) of the *Employment Act*.

33. I examined the other awards. The claims relate to salary and leave. The court finds that the claims were not controverted and hence no basis to disturb awards (Mbogo v Shah).
34. The award of notice pay is upheld for lack of procedural fairness and was due under section 35 of the *Employment Act*.
35. In the upshot the Judgment and Decree of the Hon. D. Kuto (SPM) delivered on 10th April 2025 in Mavoko MCELRC No. E082 of 2024) is upheld. The appeal is held to lack merit and is dismissed with costs to the respondent.
36. It is so held.

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 Chach

Respondent - Ms Onyiego

