

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. E197 OF 2023

(Before D. K. N. Marete)

TAILORS & TEXTILES WORKERS.....1ST APPELLANT
JOEL K. CHEBII2ND APPELLANT
AND
COLLINS KIBWONI INDUTI..... RESPONDENT

JUDGMENT

This matter was originated by way of an appeal dated 9th October, 2023. It comes out as follows;

1. *The Subordinate Court misdirected himself on the matters before him and the relevant law on the matter in falling to consider that the Appellants had proved their claim that the Respondent was not unlawfully and/or unfairly terminated from employment to the required threshold but had in fact deserted employment voluntarily thereby making a wrong and erroneous decision.*
2. *The Subordinate Court erred in law and fact in falling to find that the Respondent had failed to meet the threshold set out under Section 47 (5) of the Employment Act thereby arriving at erroneous decision.*
3. *The Subordinate Court in falling to appreciate and consider the Appellants pleadings, evidence and submissions and giving more weight to the Respondent's submissions arrived at a wrong and erroneous decision.*
4. *The Subordinate Court failed to consider the Appellants Counterclaim against the Respondent thereby ignoring pertinent issues raised in the pleadings, evidence and written submissions on the Counterclaim and dismissed the Counterclaim despite overwhelming unchallenged evidence to the contrary.*

5. *The Subordinate Court misdirected himself or acted on matter which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration particularly the issue of constructive dismissal which was never pleaded nor proved thereby arriving at erroneous decision in law.*
6. *The Subordinate Court misapprehended the facts by failing to consider the Appellants pleadings, evidence and submissions and hence thus arriving at a wrong and erroneous decision.*
7. *The Subordinate Court misdirected himself on the law and matters before it thereby making a decision that is wholly erroneous in law.*
8. *The Subordinate Court's decision was wholly erroneous in law, contrary to judicial precedent on the matters and a miscarriage of justice.*

REASONS WHEREOF the Applicant prays for orders:-

- i. *The Appellant prays that the appeal herein be allowed setting aside the entire Judgement of the Subordinate Court delivered on 11 September, 2023 in Nairobi MCELRC NO. E701 of 2022 and substituting the said Judgement and order with dismissing the Respondents Claim and allowing the Appellants Counter-Claim dated 12 May, 2022.*
- ii. *Costs of this appeal and costs of the claim and counter-claim at the Subordinate Court be borne by the Respondent.*
- iii. *Any further relief that the Court may deem fit and appropriate in the circumstances.*

The Appellant chose to tackle the various grounds of appeal under the following headings

- a) Whether the learned magistrate erred in failing to appreciate the reasons for Appellant's termination and whether the Appellant was unfairly terminated?
- b) Whether the subordinate court erred in awarding the reliefs sought?
- c) Whether Appellants are entitled to the prayers sought in the counter-claim?

In so doing the Appellant set out and established the criterion for interference with the judgment of a trial court as hereunder;

The Court of Appeal in Green & another v Kazungu & 2 others (Civil Appeal E017 of 2020) [2022] KECA 991 (KLR) (23 September 2022) (Judgment) cited with approval and set out the threshold for the Appellate Court to interfere with the judgment of the trial court as follows at para 14-15 of the judgment.

"14. In the case of Selle and another vs. Associated Motor Boat Co. Ltd [1968] EA 123 the Court of appeal held:

"The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that the misapprehended the facts: thirdly, that he took account of considerations of which he should not have taken account: fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one. Is plainly wrong. United India Insurance Co. Ltd. Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR."

15. In addition to the above parameters, we are alive to the fact that this Court should only Interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court Is demonstrably shown to

have acted on wrong principles in reaching its findings. See Mwanasokoni V. Kenya Bus Services [1985] KLR 931."

This has all along been a useful guide in the conduct and determination of appeals all over.

As to the 1st issue for determination, the Appellant draws this court to the provisions of section 47(5) of the Employment Act, 2007 which provides as follows;

“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 employed while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

The Appellant submits that section 47(5) of the Employment Act, 2007 obligates the employee to establish a case of unfair termination of employment or wrongful dismissal whereas the Respondent employer bears the burden of justifying the grounds for such termination.

Further, it is trite that who alleges must prove. This position has been reiterated severally by courts in their decisions as was done in the case of **Wilfred Olooko Muroka v Nzoia Sugar Company Ltd (2019) eKLR** at page3, where the court observed that the employee had the onus of proving that indeed there was unfair termination. This was as follows;

“The Claimant bears the onus of proving on a balance of probabilities in terms of Section 107 and 108 of the Evidence Act that the termination of his employment was wrongful and unfair.

The Respondent only bore the burden of rebuttal at the time as enshrined in the evidence Act.

The Appellant submits that in the absence of demonstrating that the Respondent's employment was terminated by the Appellant, the Respondent miserably failed to meet the legal and evidential threshold required to demonstrate an unlawful termination and or wrongful dismissal from employment. Thus the finding that the Respondent herein was unfairly and or unlawfully terminated from employment, was without basis and erroneous in the circumstances. To this end the Appellant invites this court to associate with the celebrated authority of **Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipa (2021) eKLR** where the court at page 5 observed as follows;

"It binds the claimants at the onset bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost. The respondent's case overwhelms that of the claimant.

This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47 (5) of the Employment Act, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such."

The Appellant further submits that the Respondent was never a good worker in that his performance at work was wanting. This was occasioned by gross misconduct as particularized at paragraph 18 and 25 of the Response to the Claim and the Counter Claim. This is also demonstrated through the notice to show cause and the reply thereto in which the Respondent concedes to failing to report the accident to the police station and also deserting work. He did not report work from the date of the accident on 7th December, 2020 without lawful cause or permission until 27th September, 2021 when he showed up after about a year to collect the letter of show cause.

The Appellant again submits as follows;

- (i) The testimony of the Respondent was to the extent that throughout his period of absence he was in communication with a Mr. Komen, his colleague.
- (ii) The Respondent further testified that despite collecting the show cause letter on 27th September, 2021, he responded to it on 4th October, 2021, well over a week down the line.
- (iii) The Response to show cause is couched in a language suggesting that his termination of employment had occurred whereas no disciplinary hearing had been conducted.
- (iv) The Respondent was able to deliver the Response to show cause on 4th October, 2021 but is unable to account for his allegation that he was not allowed into the Appellant's premises after the accident of 7th September, 2020.
- (v) This is a clear case of approbating and reprobating on the issue of access to the Appellant premises in his testimony to the trial court.

The conduct of the Respondent is indicative of a worker who was at all times inclined to sabotage and frustrate the disciplinary process by failing to attend work even after the issue of the show cause letter. This suit came about immediately thereafter and espouses a situation as was had in the authority of **Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR**. The Respondent all this time had not been terminated from employment and was expected to be at work until the finalization of the disciplinary process. His allegations of being denied entry by security guards and subsequent termination was all denied by the 2nd Respondent at trial. These were not proven and cannot stand as grounds for unlawful termination of employment.

The Appellant in the penultimate submits that they made all effort to get in touch with the Respondent through his colleague, a Mr. Komen. This somehow worked and he was able to collect the show cause letter but continued absconding duty thereon. Again, the Respondent has *in toto*

failed to establish a case of termination of employment to any standards as was observed in the authorities of **Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR** and **Kipkepe Limited v Peterson Odieki Tai (2016) eKLR**.

The Respondent in their written submissions dated 16th September, 2025 reiterate their case for unlawful termination of employment and submit that they did not abscond duty whatsoever. Instead, it was the Appellants who instructed him to stay at home and therefore denied him an opportunity to attend the disciplinary hearing. They also deny having been issued with a notice to show cause or being subjected to a disciplinary hearing in accordance with section 41 of the Employment Act, 2007.

The Respondent submits in reliance of various authorities and concludes that this appeal is devoid of merit and should be dismissed with costs. Not at all. On the contrary, the appeal demonstrates a case of a wayward and recalcitrant employee who was barely an asset to the employer. Essentially as demonstrated by the Appellant, the Respondent was never terminated from employment but set up gimmicks to transcend the requirements of a flowing employment relationship *inter partes*. This comes out clear from the respective testimonies of the parties at trial and dictates the direction this appeal should take.

The other salient issue of this appeal is whether the trial court erred in awarding the reliefs sought. The Appellant submits that in view of the fact that the Respondent never suffered unlawful termination of employment as so established, he becomes dis-entitled to the reliefs sought. Such award by the trial court therefore comes out as erroneous and bad in law. I wishfully agree. A case of award of the relief sought in the form of notice pay, damages for unlawful termination of employment and accrued leave days is not feasible in the circumstances.

The last issue for determination in this appeal is whether the Appellant is entitled to the Counter Claim. The Appellants case and submission is founded on the fact that the Respondent did not tender any evidence to discount the Counter Claim amounting to Kshs. 1,375,000.00. They were all this time in control of the motor vehicle which he admitted but did not report this to the police station thereby exposing the Appellant to loss to the tune of the Counter Claim. This is all illustrated at paragraph 26 of the Response to Memorandum of Claim and Counter Claim and also paragraph 21 of the Respondent's witness statement dated 5th April, 2023.

This loss was a consequence of the Respondent's negligence in reporting the accident to the police so as to facilitate the 2nd Appellant to compensation by the insurer. The Respondent was instructed to so report but neglected to report the accident within seven (7) days of the date of occurrence for the insurer to attach liability. The Respondent submits that indeed, the trial court addressed this issue and found that the Claimant was not negligent and the accident occurred out of a natural cause, tyre bursts. This is on the basis that the Appellant did not adduce any evidence to prove that the accident was a causative of their negligence.

This court disagrees with the Respondent's submissions on the Counter Claim. This is because through and through, the Appellant substantially through evidence and submissions brings out a case of negligence of the Respondent by failing to report the accidents in due time despite knowledge of this requirement and agitation so to do. He must therefore bear the costs of the loss. The Counter Claim falls onto the Appellant as against the Respondent. The Respondent must therefore bear the same in disregard of the erroneous findings of the trial court on the matter. This issue is as such not negligence in the causation of the accident but indeed in reporting the same to the relevant police station.

I have also considered the written submissions on the various issues raised by the Respondent and found these not substantial or convincing. Their case fails.

I am therefore inclined to allow the appeal and Counter Claim and revise awards as follows:

- (i) The Respondent be and is hereby ordered to meet and pay Kshs. 1,375,000.00 being the amount of Counter Claim
- (ii) Each party shall bear their costs of the Appeal and Counter Claim.

Delivered, dated and signed this **25th** day of **February** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Vincent Olala instructed by Litoro & Omwebu Advocates for the Appellant.
2. Mr Wambilianga instructed by Wambilanga Majani & Associates Advocates for the Respondent.