

1. By a Memorandum of Appeal dated 19th April 2022 the Appellant impugned the Judgment and Decree of the lower court delivered on 24th March, 2022 in Kajiado CMELRC Cause No. 10 'B' of 2020 on the following grounds:-

a) That the Learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the Claimant/Respondent's dismissal was unfair and unlawful.

b) That the Learned Magistrate failed to consider the Respondent/Appellant's evidence and/or misapprehended the law in arriving at a decision that the Claimant/Respondent was unlawfully and unfairly dismissed from employment.

c) That the Learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the Claimant/Respondent was unfairly dismissed from

employment and that the dismissal was unfair and unlawful.

d) That the Learned Magistrate erred in law and fact and/or applied wrong principles and parameters by awarding the Claimant/Respondent one month's pay in lieu of notice.

e) That the Learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant in awarding the Claimant/Respondent Kshs. 97,704.00 as compensation or any amount thereof.

f) That the Learned Magistrate erred in law and/or applied the wrong principles in awarding the Claimant/Respondent costs.

2. The Appellant prays for orders that:-

a) This Appeal be and is hereby allowed with costs to the Appellant, the Judgment of the Chief Magistrate's Court be reviewed and the

Claimant/Respondent's claim be dismissed in its entirety with costs.

b) This Honourable Court be pleased to review the Judgment of the Learned Magistrate to disallow and/or dismiss the Claimant's/Respondent's claim for payment in lieu of termination notice.

c) This Honourable Court be pleased to review the judgment of the Learned Magistrate to disallow and/or dismiss the Claimant's/Respondent's claim for compensation.

d) Any other orders as the Honourable Court May deem fit and just.

Background

3. The background to the dispute is relatively straightforward. The Respondent was employed by the Appellant as a general worker on a casual basis from 3rd July, 2015 but subsequently he was confirmed to permanent employment in the spray department. The Respondent worked for the

Appellant continuously for a period of 4 years and 7 months. His last gross monthly salary was Kshs. 16,284/=.

4. On 7th February, 2020, the Respondent's child allegedly fell suddenly ill and he informed his supervisor, one Irene and requested for sick off leave to enable him take the child to hospital. He reported back to work on 9th February, 2020 because 8th February, 2020 was allegedly his scheduled off day.
5. Upon his return, the Respondent was issued with a warning letter directing him to explain his whereabouts from 7th to 8th February, 2020. The Respondent provided a written explanation that he had taken his child to hospital due to an emergency and he duly informed his supervisor. He further explained that 8th February was his scheduled off day.
6. Despite the said explanation, a disciplinary meeting was convened on 10th February, 2020 and thereafter, he was summarily dismissed from employment by a letter dated 13th

February, 2020. Aggrieved by the dismissal, the Respondent filed suit in the lower court on 7th September, 2020 seeking various reliefs contending that the summary dismissal was unfair and unlawful because there was no valid reason and the disciplinary hearing was a sham.

7. The appellant denied the Respondent's allegation of unfair termination and averred that the reason for the dismissal was absence from work by the respondent without permission from 6th to 9th February 2020. It further averred that the respondent reported back on 10th February 2020 and he was served with a show cause letter to explained his absence. In his response he stated that he had a sick child whom he took to a herbalist. The explanation was not satisfactory and he was invited to a disciplinary hearing and he attended with a union official. Subsequently, he was summarily dismissed vide a letter dated 13th February 2020. The appellant further denied all the reliefs sought by the respondent and prayed for the suit to be dismissed with costs.

8. After a full hearing, the learned trial court (Hon. Kahuya PM) found that the Respondent had indeed absconded duty and he was accorded a fair hearing before the summary dismissal. However, she found the employer should have given the respondent a warning and not dismissal since the desertion was for only three days and he had no previous record of misconduct . She concluded that the dismissal of the respondent was unfair and awarded him compensation equal to six months gross salary, one month salary in lieu of notice and costs of the suit.

Submissions in the appeal

9. The Appellant filed its written submissions dated 3rd November 2025. In brief, it was submitted that the trial court fell into error by making contradictory findings in the impugned judgment. It was further submitted that the learned magistrate ought to have dismissed the Respondent's claim entirely since she had made a finding

that the Respondent had absconded duty and that due process was followed before the summary dismissal. Instead, the trial court proceeded to award the Respondent one month's salary in lieu of notice and six months' salary as compensation for unfair termination.

10. It was submitted that the court cannot probate and reprobate at the same time. Reliance was placed on the case of **West FM Media v JMK (Civil Appeal 1 of 2020) [2023] KEHC 692 (KLR)** where the court held that a judgment must be clear, consistent and self-contained, and that contradictory findings render a judgment incurably defective as it offends the principle of finality and legal certainty.
11. On the substantive validity of the termination, Section 44 of the Employment Act, 2007 was invoked to urge that the summary dismissal was justified since the Respondent absconded duty for three days without permission, and that

this conduct constituted gross misconduct justifying summary dismissal under Section 44(4) of the Act.

12. Regarding procedural fairness, it was submitted that Section 41 of the Employment Act, 2007 was complied with since the employer informed the respondent the reasons for the intended termination and accorded him a chance to defend himself in writing and before a disciplinary hearing. It further submitted that the trial court acknowledged, at page 107 of the Record of Appeal, that due procedure was followed. Therefore, it was urged that there was no basis for awarding compensation of six months' salary, and that the award was not anchored on any wrongdoing on the part of the Appellant.
13. In conclusion, the Appellant prays that the appeal be allowed, the judgment of the lower court be set aside, and the Respondent's entire claim be dismissed with costs.

14. The Respondent opposed the appeal vide submissions dated 2nd December, 2025. From the onset, it was argued that the appeal was based on a misapprehension, misconception and non-disclosure of the trial magistrate's judgment.
15. It was submitted that the Appellant misquoted the judgment to suit a position not found in law. It was further submitted, that a dismissal can be lawful but unfair, or even fair but unlawful. Counsel urged the court to appreciate this distinction which is well-grounded in employment law jurisprudence.
16. The Respondent supported the trial court's reasoning that, although absconding was a valid ground for termination and due process was followed, the dismissal was nonetheless unfair in the circumstances of the case. It was argued that the trial court considered the fact that the Respondent had no previous disciplinary issues and that a warning would have sufficed. The court also noted that the Appellant had

not demonstrated the grave inconvenience suffered during the three days the Respondent was away.

17. To buttress the foregoing submissions, the Respondent placed reliance on **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR**, where the court held that it is not enough for an employer to simply state that an employee has deserted duty. The employer must show efforts made towards reaching out to the employee and putting him on notice that termination on this ground was being considered.

18. Further reliance was placed on **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR**, where the court held that an employer relying on the ground of desertion must demonstrate that efforts were made to get in touch with the deserting employee. In the instant case, it was submitted that the Appellant's witness admitted that no text message was sent, no representative was sent to trace

the Respondent, and no call log was produced to prove that any phone call was made.

19. Finally, reliance was placed on **Mwangi Odhiambo Dancun v Crest Security Services Limited [2019] eKLR**, where the court adopted the South African decision in **Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** that the distinctive feature in desertion is a demonstrable intention on the part of the employee not to return to work. It was submitted that he returned to work after three days intending to continue with his duties, thereby negating any intention to desert.
20. The Respondent submitted that the trial court's judgment was straightforward, brief, and straight to the point, and was not defective in any way. It was further submitted that the Appellant does challenge the reliefs awarded by the trial court being excessive, but rather argued that they should not have been awarded at all. Therefore, it was submitted that there is no basis for disturbing the same.

21. Notably, the Respondent revealed that the Appellant had settled the decretal sum and costs in the lower court, rendering the appeal moot case. Consequently, the court was urged to dismiss the appeal with costs to the Respondent.

The Mandate of this Court as a First Appellate Court

22. This court is seized of this matter as a first appellate court. Its mandate is to re-evaluate the evidence on record afresh and to draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle was famously articulated by the Court of Appeal in **Selle & another v Associated Motor Boat Company Ltd (1968) EA 123** where it was held:-

"An appeal to this court from a trial by the High 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."

23. Guided by these principles, I have carefully considered the Record of Appeal, the pleadings filed in the lower court, the submissions made by both parties in this appeal, and the authorities cited. The following issues fell for determination:-
- a) Whether the summary dismissal of the Respondent was unfair and unlawful.
 - b) Whether the Respondent is entitled to the reliefs awarded by the trial court.
 - c) What orders should issue on costs.

Analysis and Determination

Unfair and unlawful termination of employment

24. Section 45(1) & (2) of the Employment Act provides that:-

“(1) No employer shall terminate the employment of an employee unfairly.

(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 employee’s 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.”

25. According to the above provision, for termination of employment to pass muster, there must be valid reason related to the employee’s conduct, capacity, or compatibility, or based on the operational requirements of the employer, and a fair procedure must be followed.

26. In this case there is no dispute that the Respondent was absent from his place of work from 6th to 9th February 2020.

He alleged that he was attending to a sick child who had fallen ill suddenly on 7th February 2020. He alleged that he notified his supervisor Irene about the matter and the reported back on 9th February 2020 because 8th February was his scheduled off day. The employer was not satisfied by the said explanation and dismissed him from employment.

27. I have considered the evidence adduced and I am satisfied that the Respondent did not prove that his child fell ill, that he reported the matter to his supervisor, and that he was scheduled to be off duty on 8th February 2020. There is proof that he took the child to an herbalist as alleged. He did not call Irene as a witness to prove that he had notified her about the sick child. In his pleadings and statement he stated that he sought permission to take the child to hospital. In the circumstances, I find and hold that the reason for the termination was valid and fair.

28. As regards the procedure for the termination, Section 41 of the Act which states that:-

“(1) Subject to section 42(1), 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.

(2) Notwithstanding any other provision of this Part, 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.”

29. Applying above provision to the evidence on record in the instant case, I am satisfied that the dismissal was done in accordance with a fair procedure. The Respondent was

served with a show cause letter and he responded. Thereafter he was accorded a disciplinary hearing where he attended with a union official and made his representations which were considered. Finally, the decision of summary dismissal was communicated by the letter dated 13th February 2020.

30. In the circumstances, I find that the Respondent did not prove unfair termination as required by section 47(5) of the Employment Act. I further find that the appellant proved on a balance of probability that the reason for the termination was valid and that a fair procedure was followed. This conclusion is fortified by the Court of Appeal decision in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** where it held as follows:-

“Four elements must thus be discernible for the procedure to pass muster:

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

c) The reliefs awarded

31. The Appellant challenges the awards of one month's salary in lieu of notice and six months' compensation for unfair termination. In view of the foregoing finding that the summary dismissal of the claimant was grounded on a valid reason and that fair procedure was followed, I find and hold that the Respondent is not entitled to compensation for unfair termination and salary in lieu of notice. Consequently, I make the following orders:-

a) The Appeal be and is hereby allowed.

- b) The Judgment of the trial Court is set aside and substituted with an order dismissing the Respondent's Statement of Claim in its entirety.
- c) The Appellant is awarded costs of the appeal and court below.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 3RD DAY OF MARCH, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Manyara for the Applicant

No appearance for the Respondent