Muithya v Meditest Diagnostic Services Limited (Appeal E248 of 2024) [2026] KEELRC 585 (KLR) (2 March 2026) (Judgment)

Neutral citation: [2026] KEELRC 585 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E248 OF 2024

NJ ABUODHA, J

MARCH 2, 2026

BETWEEN

MARY NDINDI MUITHYA ..... APPELLANT

AND

MEDITEST DIAGNOSTIC SERVICES LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment of Honourable Rawling Lilima Mr, Senior Resident Magistrate delivered on 3rd November, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 30th November 2023, the Appellant appeals against the Judgment of Honourable Mr. Rawling Lilima (SRM).

2. The Appeal was based on the grounds:

   i. That the Learned Magistrate erred in law and in fact in arriving at contradictory finding that the Appellant resigned on 16th January 2022 ignoring the fact that she had been terminated on 2nd January 2022 long before her resignation AND further failing to appreciate that the Appellant resignation was never accepted as required in law contrary to the pleadings, testimony and evidence produced before the court.

   ii. That the Learned Magistrate erred in law and in fact in arriving at contradictory findings that the Appellant was not terminated from her employment yet the Respondent had admitted the termination and even produced evidence is support of that fact.

   iii. That the Learned Magistrate erred in law and fact in failing to award one-month salary in lieu of notice despite evidence already establishing that the Respondent failed to follow the laid down procedure before terminating the Appellants employment and never even gave her a hearing prior to termination.

iv. That the Learned Magistrate erred in law and in fact by failing to consider whether due process was followed prior to termination of the Appellants employment and failing to appreciate that the Appellant was never paid her terminal dues.

v. That the Learned Magistrate erred in law and fact in failing to appreciate the evidence before court therefore dismissing all the other heads of claim for compensation made by the Appellant despite evidence is support of the several claims having been produced.

vi. That the Learned Magistrate erred in law and fact in failing to appreciate that the reason proffered by the Respondent for the unfair dismissal was illogical and failing to award damages as appropriate.

vii. That the Learned Magistrate erred in law and fact in dismissing the entire suit and failing to award cost of the suit to the Appellant.

3. The Appellant prayed that this appeal be allowed with costs, the Learned Magistrate's judgment, decision on dismissing the entire suit be set aside and quashed and be substituted by this Honourable Court's Orders and that this Honourable Court do adjudicate and determine the issue whether the Appellant was unfairly and unlawfully terminated from employment and the compensation payable and arrive at a just judgment in light of the evidence on record.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Kang'oli & Company Advocates filed written submissions dated 10th July, 2025 and on grounds 1, 2 and 3, Counsel submitted that the Appellant issued her resignation on 16th January 2022 but unknown to her, her employment had been terminated on 2nd January 2022 meaning that at the time she resigned, she had already been terminated. This was confirmed by the Respondent in their email dated 17th January 2022. Counsel relied on the case of Seth Atianyi Ingariru & another v Eco Bank Kenya Ltd [2014] eKLR where the court found unfair termination without hearing where the employee was terminated before resignation. Counsel urged the court to find that the Appellant did not resign from employment but was summarily terminated from employment on the 2nd January 2022 by the Respondent without notice, without warning and or any hearing being accorded to her.

6. Counsel relied on section 4(3) of *Fair Administrative Action Act* on the right to fair hearing, Article 41(1) of *the Constitution* of Kenya on fair labour practices and section 45 of the *Employment Act* on what amounts to unfair termination. It was his contention that there was no dispute that the Appellant was an employee of the Respondent. The main contention was whether or not the termination was unlawful.

7. Counsel relied on the case of Henry Owino Obonyo v Alloice Odhiambo Lumutu & Another [2019] eKLR on adherence to the above provisions of law and the case of Janeth Chepkemoi Machira & Another v Laikipia University [2021] eKLR on fair hearing under section 41 of the *Employment Act*.

8. Counsel referred to the testimonies given before the trial court by the parties. The Respondent witness in her testimony claimed that the Claimant's termination was due to her absence from work on 23rd December, 2021 without leave or lawful cause leading to her termination on 2nd January, 2022.

9. That the Respondent witness (RW-1) in cross-examination confirmed that she was aware as a Human Resource professional, that an employee had to miss work for a period of over 7days before the employer can issue a notice to show cause. The only issue to note was that the period between 24th

December 2012 to 1st January 2022 was just 8 days and out of which, the 25th (Christmas day), 26th December (Boxing day) and 27th December (26th falling on a Sunday made 27th a holiday) and that 1st January (New year) were public holidays where people do not ordinarily go to work. Therefore, the Appellant if at all was only away from duty for four (4) days which was below the legal period required to justify being considered to have absconded duty.

10. Counsel submitted that at the given time (Covid-19 period), the Appellant was in isolation for 14 days as required by the Ministry of Health and recommended by the Government of Kenya for public health and safety reasons after testing positive for Covid-19, a fact confirmed by the medical test conducted at the Respondent's Laboratory on 23rd December 2021 by a medical practitioner employed at the Respondent's facility and produced to the court as Appellant's Exhibit 2.

11. That after testing positive for Covid-19, as a measure to curb the spread of the virus, the Appellant was entitled to leave after seeking medical attention at Respondent's facility and it was during the Appellant's sick leave that the Respondent proceeded to unfairly and illegally terminate her services without issuing any prior warning/notices and affording the Appellant a hearing.

12. The Respondent's witness in an attempt to sanitize their wrongful termination of the Appellant alleged that prior to issuing the termination letter, they had served the Appellant with verbal and written warnings about her incessant behavior of failing to report to work. No document of any written warnings to the Appellant were presented to court to support that badly crafted lie.

13. That the only documents availed in an attempt to support the Respondent's narrative of issuing warnings was Respondent's Exhibit 2 addressed to a third party who was not the Appellant. The aforementioned letter was not in any way addressed to the Appellant; therefore, the testimony that the Appellant was issued with both verbal and written to the leave policy, subheading Sick Leave at paragraph 2 of the Respondent's list of documents, it read; "Subject to production of written evidence from Meditest Hospital resident medical practitioner, any period of absence from duty due to sickness or illness or incapacity due to accident, shall be treated as sick leave with full pay." This paragraph clearly implied that communication of a staff illness should be communicated by the medical practitioner to the Human Resource and the burden was not on the Appellant to do so.

14. That in her testimony Respondent's witness insisted that it was the Appellant to produce the document to the HR which was contrary to the aforementioned paragraph. That the Respondent was aware of the Appellant's sick leave information which was within the organization's records, noting that it was the Respondent's own doctor that declared the Appellant positive for Covid-19 and the Respondent actually paid for the tests.

15. Counsel submitted that the Respondent alleged in her witness statement and testified that up until the material day they served upon the Appellant her termination letter, they had no means of communicating with the Appellant. The Respondent claimed they did not have the Appellant's mail ID. The Respondent being the Appellant's employer had access to the Appellant's records as was required by Human Resource. The allegation that the Appellant was unreachable was fallacious since a perusal of Claimant's exhibit 1 proved otherwise.

16. That on the documents produced by the Respondent, several documents contained the Claimants email address and the same could be located in the Respondent list of documents. These were documents produced by the Respondent and were actually in the Respondent's possession hence they could not claim that they were never aware of the Appellant's email address which they had been using all the time during the subsistence of the employment relationship.

17. Counsel submitted that from the step by step outline given above, the Appellant was not accorded a fair hearing during the process of termination as per section 41 of the *Employment Act*. Reasonably and considering the nature of the Appellant's dismissal from the employment by the Respondent it was unfair, prejudiced and tremendously unreasonable. Counsel also relied on the on the provisions of Section 107 and 108 of the *Evidence Act*. That the Respondent's witness response to not providing evidence to prove that the warning letters had been issued to the Appellant was because no such letters were ever prepared.

18. Counsel relied on section 47(5) of the *Employment Act* on the respective burden of proof where the burden of proving that an unfair termination of employment has been occasioned shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. Counsel relied on the case of David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR on requirement for procedural fairness before termination.

19. Counsel submitted that the Respondent failed to discharge its burden of proving substantive and procedural fairness in termination of the Appellant. That the Respondent failed to avail any proof of reason for termination according to Section 43 of the *Employment Act* rendering the termination unfair in line with Section 45 of the same.

20. On grounds 4, 5, 6 and 7: Whether the Appellant was entitled to the relief sought counsel submitted that once a court of law finds that a termination of employment is wrongful or unfair, then it is only left with one question and that is to determine the most appropriate and deserving remedy as provided for under the *Employment Act*. Counsel relied on section 50 and 49 of the *Employment Act* on compensatory damages the court should award. That the Appellant was entitled to the reliefs sought considering the nature of the unfair termination and the period she served the Respondent where her salary was Kshs 40,000/= as claimed in her statement of claim.

Respondents' Submissions

21. The Respondent did not participate in this appeal despite proof of service of the proceedings.

Determination

22. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by the Appellant herein and proceeds to analyse them as follows. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

23. In this case, the Judgment of the trial court was that the Claimant's suit was dismissed with no order as to costs while finding that there was no unlawful termination of the Claimant since she had absconded

duties with no intention of coming back. The Appellant was aggrieved by the said judgment and raised seven grounds of appeal which this court will condense in to two issues namely: -

i. Whether the trial court erred by finding that the Appellant was not unlawfully terminated.

ii. Whether the trial court erred by not awarding the Appellant her terminal dues and reliefs sought

Whether the trial court erred by finding that the Appellant was not unlawfully terminated.

24. It was not in dispute that the Appellant was an employee of the Respondent who was employed in October 2020 as a sales executive. How the parties ended the employment relationship was what was in dispute in this court. The Appellant alleged that she tested positive for COVID -19 and went on 14 days sick leave from 23rd December,2021 to 16th January, 2022 when she resigned. That upon resigning was when she received her summary dismissal letter dated 2nd January,2022 on 17th January, 2022 via email notifying her there she was dismissed with effect 1st January, 2022 for absconding duties.

25. The Respondent on the other hand alleged that the Appellant absconded duties from 23rd December, 2021 with no intention to come back which was supported by the Appellant's resignation on 16th January, 2022. That the efforts to reach the Appellant were in futility as she had switched off her phone and she did not apply for the said sick leave or inform the Respondent of her sickness which they came to know when the claim was filed.

26. The court notes that the Appellant had a burden of proof under section 47(5) to illustrate that she was unfairly terminated before the Respondent could be called upon to justify the grounds of termination. Reliance is put on the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR on the respective burdens.

27. This court was not bound to undertake a burden of proof beyond reasonable doubt as it is in criminal matters but that of civil matters of balance of probabilities. In other words, would a reasonable employer act the same. However, the court will not replace its subjective views of what constitutes a valid reason for termination of an employment contract with that of the employer. Justice Professor Ojwang' in the case of Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009 as cited in Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR observed as follows: -

> " There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed"

28. Further the Court of Appeal in Civil Appeal No 66A of 2017, Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019) eKLR stated as follows:

> "...It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services..."

29. Drawing from the above cases although the standard of proof in such cases is on balance of probability the Appellant had a duty to illustrate she was unfairly terminated. The trial court observed that the Appellant ought to have illustrated that she was unfairly dismissed. That she never produced evidence of notifying the Respondent of her sickness or applying for sick leave in writing.

30. In addition, if she was to be away for 14 days on sick leave why did she not resume after 14 days from 23rd December, 2022 but only resigned on 16th January, 2022 past the 14 days sick leave. It clearly means she had no intention of returning to work with the Respondent. Reliance is placed on the case of Peris Nyambura Kimani v Albit Petroleum Limited [2014] where the court stated that: -

> "...in the circumstances where an employee is unwell for whatever reason, within the employment and labour relations regime, the basic requirement on the part of the employee under the *Employment Act* is that when one is sick or unwell, this is to be brought to the attention of the employer within a reasonable time.

31. From the above authority it is clear the responsibility of notifying the employer of employee's sickness rests with the employee. The Appellant could not place this responsibility on the medical practitioner at the Respondent's facility as alleged. The practitioner was not a party to their employment relationship.

32. In this case as observed by the trial court the Appellant did not notify the Respondent of her sickness even if she was treated at the Respondent's facility the procedure required of a sick employee ought to be followed. Why did she not apply for sick leave in writing? Why did she not reasonably inform the Respondent of her sickness?

33. This court notes that the Appellant intended never to resume duties when she resigned on 16th January, 2022. The Respondent illustrated that it made efforts to reach the Appellant through the phone and it was switched off. That it did not have the Appellant's mail ID. In the case of Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR this court held that: -

> An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.

34. The Respondent though not required to justify its decision to dismiss the Appellant on grounds of absconding duties the Respondent illustrated the efforts made to reach the Appellant but the Appellant never produced evidence that she was unfairly dismissed. The court therefore agrees with the trial court that the Appellant was not unlawfully terminated.

Whether the trial court erred by not awarding the Appellant her terminal dues and reliefs sought

35. The trial court having established that the Appellant was not unlawfully dismissed was justified on not awarding the Appellant the reliefs sought. The trial court awarded the Appellant certificate of service which is an entitlement under section 51 of the *Employment Act*. The Appellant was not entitled to damages for unfair termination and notice pay since she was not unlawfully terminated. The Appellant was also not entitled to severance pay as she was not declared redundant.

36. In the upshot the court finds and holds that the Appellant's Appeal is without merit and the same is hereby dismissed with costs.

37. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF MARCH 2026

DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH 2026

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION