



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E066 OF 2025

PHELIX OCHIENG MINENE.....

APPELLANT

VERSUS

RILEY FALCON SECURITY LTD.

.....**RESPONDENT**

(Being an appeal from the judgment and decree of Hon. Maureen Nyigei (PM) in Kisumu CMELRC No. E155 of 2024 delivered on 29th July 2025)

JUDGMENT

1. This appeal arises from the Judgment of Hon. Maureen Nyigei (PM) delivered on 29th July 2025 in **Kisumu CMELRC No. E155 of 2024, Phelix Minene Ochieng v Riley Falcon Security Services**. Aggrieved by that decision, the

Appellant lodged a Memorandum of Appeal on 13th August 2025 setting out the following grounds:

- (a) *The Learned Magistrate erred in law and fact in failing to appreciate that at the time of his arrest the Appellant was at his place of work and remained an employee.*
- (b) *The Learned Magistrate erred in law and fact in failing to appreciate that the Appellant's contract had not lapsed by the time of his arrest and dismissal as spelt out in count 2 of the charge sheet in which he was charged with stealing by servant.*
- (c) *The Learned Magistrate erred in law and fact in failing to appreciate that the Respondent breached the Appellant's contract, which ran for one year from July to July of the following year, and that the last contract signed in July 2020 was therefore due to run until July 2021.*
- (d) *The Learned Magistrate erred in law and fact in failing to appreciate that entry to the Safaricom mast was digitally monitored and could only be authorised by the Respondent together with Safaricom Ltd.*

(e) *The Learned Magistrate erred in law and fact in failing to accord due consideration to the Appellant's evidence and submissions, thereby arriving at an erroneous decision.*

(f) *The Learned Magistrate erred in law and fact by applying wrong principles of the law, thereby arriving at a wrong conclusion.*

(g) *The Learned Magistrate erred in law and fact by placing on the Appellant's shoulder a heavier burden of proving his case compared to the required standard of a balance of probabilities.*

2. On the basis of these grounds, the Appellant urged the Court to set aside the Trial Court's judgment and to enter judgment in his favour as prayed in the in the statement of claim. He also sought costs of the appeal and of the proceedings before the Trial Court. The appeal was canvassed by way of written submissions.

APPELLANT'S SUBMISSIONS

3. In support of the appeal, the Appellant framed the following issues for determination:

- (i) Whether the Subordinate Court erred in finding that he was not lawfully in employment and had not been constructively dismissed; and
- (ii) Whether he is entitled to the reliefs sought.

4. On the first issue the Appellant submitted that the Trial Court erred in law and fact in finding that he was not lawfully in the Respondent's employment and that he had not been constructively dismissed. He asserted that at the time of his arrest he was still deployed at the Respondent's assigned Safaricom site, access to which was controlled through digital codes issued by the Respondent and the client, Safaricom Ltd. He contended that the Respondent's witness confirmed that such access could only be granted by them, and that the charge sheet described him as the Respondent's employee, thereby explaining his presence at the site. He further relied on his payslips, bearing staff number 52033, and on his contract of employment, which allowed an employee either to proceed on leave or continue

working and claim leave allowance later, as evidence that the employment relationship had not lapsed.

5. The Appellant further submitted that the Respondent's action of allowing him to continue working beyond the expiry of his contract, without replacement, reassignment, or withdrawal of access credentials, created a legitimate expectation of renewal of contract. He submitted that the Trial Court wrongly placed a heavier evidentiary burden upon him, whereas it was the Respondent who ought to have demonstrated that he had ceased to be their employee. He added that his four consecutive years of service, coupled with the Respondent's delay in regularising his employment, reinforced legitimate expectation. He also pointed out that his contract was tied to the subsistence of the Respondent's contract with Safaricom, which had not lapsed. In support of the doctrine of legitimate expectation, he relied on the case of **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR**.

6. On the issue of constructive dismissal, the Appellant submitted that the Respondent's refusal to allow him to resume duty after his acquittal amounted to a repudiatory breach of the employment contract. He relied on **Stephen Michuki v East Africa Safari Air Express Limited & another [2022] eKLR**, where denial of access to the workplace was recognised as a breach capable of constituting constructive dismissal. He also relied on the case of **Coca Cola East Africa & Central Africa v Maria Ligaga [2015] eKLR**, in which the Court of Appeal articulated the test for constructive dismissal as conduct by the employer that substantially alters an essential term of the contract.

7. The Appellant therefore submitted that, by refusing to reinstate him following his acquittal, the Respondent effectively placed him on indefinite suspension without pay, which amounted to constructive dismissal and demonstrated an intention no longer to be bound by the employment relationship. On reliefs, the Appellant submitted that he had discharged his burden under section 47(5) of the Employment Act by proving unfair termination, while the

Respondent had failed to justify the termination. He therefore urged the Court to allow the appeal as prayed. He also urged the Court to exercise its discretion on costs in his favour.

Respondent's Submissions

8. The Respondent began by urging the Court to be guided by its duty as a first appellate court to subject the evidence presented at trial to a fresh exhaustive scrutiny and to come up with its own conclusions, citing **Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123**. It framed the issues for determination as whether the Appellant's employment was unlawfully terminated and whether he was entitled to the remedies sought.
9. On the first issue, the Respondent submitted that no unfair or illegal termination occurred because the Appellant's employment ended through effluxion of time upon expiry of his fixed-term contract on 16th December 2020. It asserted that the Appellant had always worked on one-year renewable contracts issued upon fresh applications, and that he did not apply for renewal for the year 2021. It pointed to records

showing that he worked on contract from 10th August 2017 to 9th August 2018, 13th November 2018 to 12th November 2019 and finally from 17th December 2019 to 16th December 2020, after which he cleared with the Respondent and did not submit a further application for employment. The Respondent further submitted that there was no evidence that the Appellant was working under its instructions at the time of his arrest in January 2021, nor proof that it had suspended him or terminated him, or participated in the criminal proceedings. It submitted that it was unaware of the criminal charges and did not initiate them, as by then the contract had lapsed.

10. On the matter of constructive dismissal, the Respondent submitted that no employment relationship existed at the time of the Appellant's acquittal. It drew attention to the absence of a contract and proof of payment of salary in the year 2021. It further submitted that there was no proof of a fundamental breach of contract or a causal link between the Respondent's conduct and the termination of employment. The Respondent emphasized that the Appellant neither

resigned nor demonstrated conduct by the Respondent compelling resignation. It relied on the definition of constructive dismissal in the **Black's Law Dictionary (Tenth Edition)** as well as the Court of Appeal case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR**, which stated as follows:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

11. The Respondent submitted that none of the elements of constructive dismissal outlined in the coca cola case (supra)

had been met in this suit. Noting that the contract ended by effluxion of time and the Appellant duly cleared and left. In respect of the alleged legitimate expectation, the Respondent submitted that the issue was raised for the first time in submissions and should therefore be disregarded. It asserted that parties are bound by their pleadings citing **Ogando v Watu Credit Ltd & another, (Civil Suit E098 of 2022) [2024] KEHC 3074 (KLR)**, which went to great lengths while citing numerous other cases to underscore that courts should disregard arguments not supported by pleadings and that submissions cannot substitute evidence. The Respondent further pointed out that the Appellant's NSSF statement showed remittances from Robinson Investment Ltd, suggesting that he was no longer employed by the Respondent.

12. Regarding the reliefs sought, the Respondent submitted none were merited. In respect of a declaration of unlawful termination, it contended that it couldn't issue as the Appellant had not proven his case to the required standard. As for salary in lieu of notice, it submitted that it was

inapplicable to a fixed term contract which had ended by effluxion of time. Concerning, compensation for unfair termination the Respondent contended that it was unavailable since the Appellant failed to discharge his burden under section 47(5) of the Employment Act. He further averred that there was no justification for the computation of Kshs. 210,156/- in the statement of claim. It relied on **George Okello Munyolo v Unilever Kenya [2019] eKLR**, which held that failure to prove unfair termination disentitles a claimant to the remedies sought. Moreover, it submitted that the Appellant had not proven special circumstances warranting the maximum award of 12 months' salary. With respect to unpaid salary from February 2021 to July 2023 the Respondent submitted that the Appellant's contract ended in December 2020. Turning to unpaid NSSF and NHIF the Respondent submitted that it fully made its remittances during the Appellant's employment. It drew attention to the pay slips as well as the tax deduction cards produced as REXhs 11-13.

13. With respect to damages for unlawful prosecution and legal fees of Kshs. 50,000/- the Respondent submitted that the award was unmerited. It asserted that no proof had been availed for the legal fees which falls in the category of special damages. Furthermore, the Respondent averred that the Appellant had not established the elements of malicious prosecution set out in **Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 others [2020] eKLR**, namely:

- (1) *The Plaintiff must show that the prosecution was instituted by the Defendant, or someone for whose act he is responsible;*
- (2) *The plaintiff must demonstrate that the prosecution was instituted without a reasonable or probable cause;*
- (3) *The prosecution was actuated by malice; and*
- (4) *The plaintiff must show that the prosecution terminated in his favour.*

14. On costs, the Respondent urged the Court to award them in its favour on account of the Appellant's failure to prove his case.

Disposition

15. The decision herein is premised on the principles set out in **Selle & another v Associated Motor Boat Co. Ltd & others** (*supra*) 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]

16. 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.

17. The issues for this Court must determine are:

- a. Whether the Respondent was unfairly terminated from employment;
- b. Whether the Respondent was entitled to the orders granted;
- c. Who is to bear the costs?

18. The Appellant was a former employee of the Respondent. He was apparently charged with a criminal act that resulted in his acquittal. The Appellant asserts the Respondent's refusal to allow him to resume duty after his acquittal amounted to a repudiatory breach of the employment contract. He cited the case of **Stephen Michuki v East Africa Safari Air Express Limited & another** (*supra*) where the Court stated that denial of access to the

workplace was a breach capable of constituting constructive dismissal. The Appellant called in aid the case of **Coca Cola East Africa & Central Africa v Maria Ligaga** (*supra*) in which the Court of Appeal articulated the test for constructive dismissal and stated that it is conduct by the employer that substantially alters an essential term of the contract.

19. The Appellant was not under any contract with the Respondent at the time of his arrest and arraignment in court for the offence of stealing by servant. It would appear the Appellant was not an employee since his contract had lapsed and had not been renewed. In the eyes of the Court, there could be no constructive dismissal where no employment existed. In the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga** (*supra*), the Court of Appeal held the following to be the principles applicable in determining whether there was constructive dismissal or not.

30. *The legal principles relevant to determining constructive dismissal include the following:*

- a. *What are the fundamental or essential terms of the contract of employment?*
- b. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- c. *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*
- d. *An objective test is to be applied in evaluating the employer's conduct.*
- e. *There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.*
- f. *An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g. *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach;*

h. The employee must within a reasonable time terminate the employment relationship pursuant to the breach.

h. The burden to prove repudiatory breach or constructive dismissal is on the employee.

i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

20. The Learned Magistrate was correct in her surmise that there was no constructive dismissal as there was no causation proved. There was nothing to show the Respondent constructively terminated the Appellant's employment. As such there was no proof to the required standard that employment existed and therefore the Appeal before me simply fails for want of merit. Appeal dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Naivasha this 4th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**