

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

APPEALS DIVISION

APPEAL NO. E223 OF 2024

MOKANO MARK MOMANY.....
APPELLANT

VERSUS

TONONOKA ROLLING MILES LIMITED.....
RESPONDENT

[Being an appeal from the judgment of the PRINCIPAL MAGISTRATE
HON. H.M NG'ANG'A Dated on 15th Jul 2024)

JUDGMENT

1. Through the Memorandum of Appeal filed on 7th August 2023, the Appellant appeals against the writ of the Judgment of Honourable H.M NG'ANG'A, PM.
2. The Appeal was based on the grounds that
 - i. The Learned Hon learned Magistrate erred in law and fact in dismissing the suit without considering and taking into account all the relevant facts and law and thus making an erroneous finding.*
 - ii. That the learned Hon. learned Magistrate erred both in law and fact in rendering the judgment without taking into account the Claimant's submissions and authorities relied upon thus making an erroneous finding.*

iii. The Learned Hon Magistrate erred in law and fact in finding that the Claimant had not proved his case on a balance of Probabilities.

iv. The Learned Hon Magistrate erred in law and fact in finding that the Claimant had instituted the suit permanently.

v. The Learned Hon Magistrate erred in law and fact in finding that the Claimant had not adduced prima facie evidence of his termination.

vi. The Learned Hon Magistrate erred in law and fact in imposing a contractual relationship between Claimant and the Respondent.

vii. The Learned Hon Magistrate erred in law and in fact in falling to appreciate the effect and purport of the evidence adduced and arriving at a decision which is not supported by the weight of the evidence adduced.

3. The Appellant prayed that the Appeal be allowed with costs, the Judgment of the trial court made on 17 July 2024 and consequential orders thereto be set aside, costs to the Appellant and Judgement be entered in favour of the Claimant as prayed for in the statement of Claim dated 12 May 2022.
4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates Gitamo Ombi & Co. Advocates filed written submissions dated 26th November, 2025 and on the issue of whether the learned magistrate erred in finding

that the Claimant had instituted the suit prematurely counsel submitted that the trial court erred. Counsel reiterated that the Appellant was summarily dismissed on the 13th January, 2022 on account of having been denied access and or entry to the Respondent's premises. This fact was not disputed and or rebutted at all by the Respondent and there was no shred of evidence produced by the Respondent to show and or demonstrate that the Claimant did not work on the 13th January 2022. That the Respondent had attempted to twist the facts to steal a march against the Appellant. Alleged that on the 13th January 2022 the Appellant was requested for a review by a company doctor which he declined. As such stopped reporting to work the following day.

6. That no evidence was tendered to demonstrate that the Appellant was requested to be reviewed by the company doctor on the 13th January 2022 and he declined to do the same. That the Respondent's witness alleged that a series of meetings were held with the Appellant on the 11th and 12th January 2022 to accept working in another department other than the loading section, however in cross-examination she

conceded that no minutes or evidence was produced to vouch for this meeting. Counsel submitted that the alleged meetings were referenced in the letter dated 17th January 2022, which letter was the one relied upon by the Respondent in an attempt to demonstrate that a request was made to the Appellant to see the company's doctor for review to determine whether the Appellant was still fit to carry his duties in the loading/dispatch section.

7. Counsel submitted that it was not known when the letter was served upon the Appellant, who according to the Respondent's witness, stopped reporting to work on the 14th January 2022. That if the Appellant stopped reporting to work on 14th January 2022, how did the letter dated 17th January 2022 reach the Appellant who emphatically stated that he did not know the same for the first time in court. That no evidence was led to show how the letter dated 17th January 2022 was served upon the Appellant.
8. That in any event the Respondent's witness statement and the letter dated 17th January 2022 have a distinct contradiction which the learned magistrate ought to have taken account of.

The Respondent's witness alleged that the Appellant was requested to see a company doctor on the 13th January 2022 whereas the letter dated 17th January 2022 indicates that he was requested on the 14th January 2022 yet on the very date the Appellant did not report to work as conceded by the Respondent's witness.

9. Counsel submitted that if the Appellant stopped reporting to work as from 14th January 2022 the Respondent without recourse as the employer may do in section 44(4)(e) of the Employment Act, that it has taken down such steps the Respondent took when the Appellant failed to report to work for instance by issuing a show cause notice to the Appellant to explain his continued absence from work and he had not been summarily terminated as indicated in the letter.

10. Counsel submitted that it was only after the Appellant wrote a demand letter dated 14th March 2022 that the Respondent's Advocates responded on a "without prejudice" basis to the said demand letter vide the letter dated 23rd March 2022 almost two months after he had already been dismissed from work. That the relationship of the Appellant and the Respondent had

already been severed on the 13th January 2022 and the Appellant had every right to proceed and file a claim for unfair termination. The contention therefore that the Appellant filed a suit prematurely does not arise and was not founded on the evidence tendered by the Respondent.

11. Counsel submitted that there was no justification for further medical review of the Appellant. He was examined at the Respondent's appointed hospital (Guru Nanak) and was given a clean bill of health to continue working in his position at the dispatch/loading section and he did not know why the Respondent continued to pay the Appellant from October 2021 to January 2022. That it was the duty and burden of the Respondent to avail the medical records of the Appellant from Guru Nanak Hospital to rebut the Appellant's position. But the trial court appreciated the contradictions in the Respondent's case but did not arrive at a different finding.

12. Counsel submitted that the allegations that the Appellant refused to undertake a medical review were substantiated as required under section 107 and 109 of the Evidence Act in view of the foregoing. That it had not been shown what steps

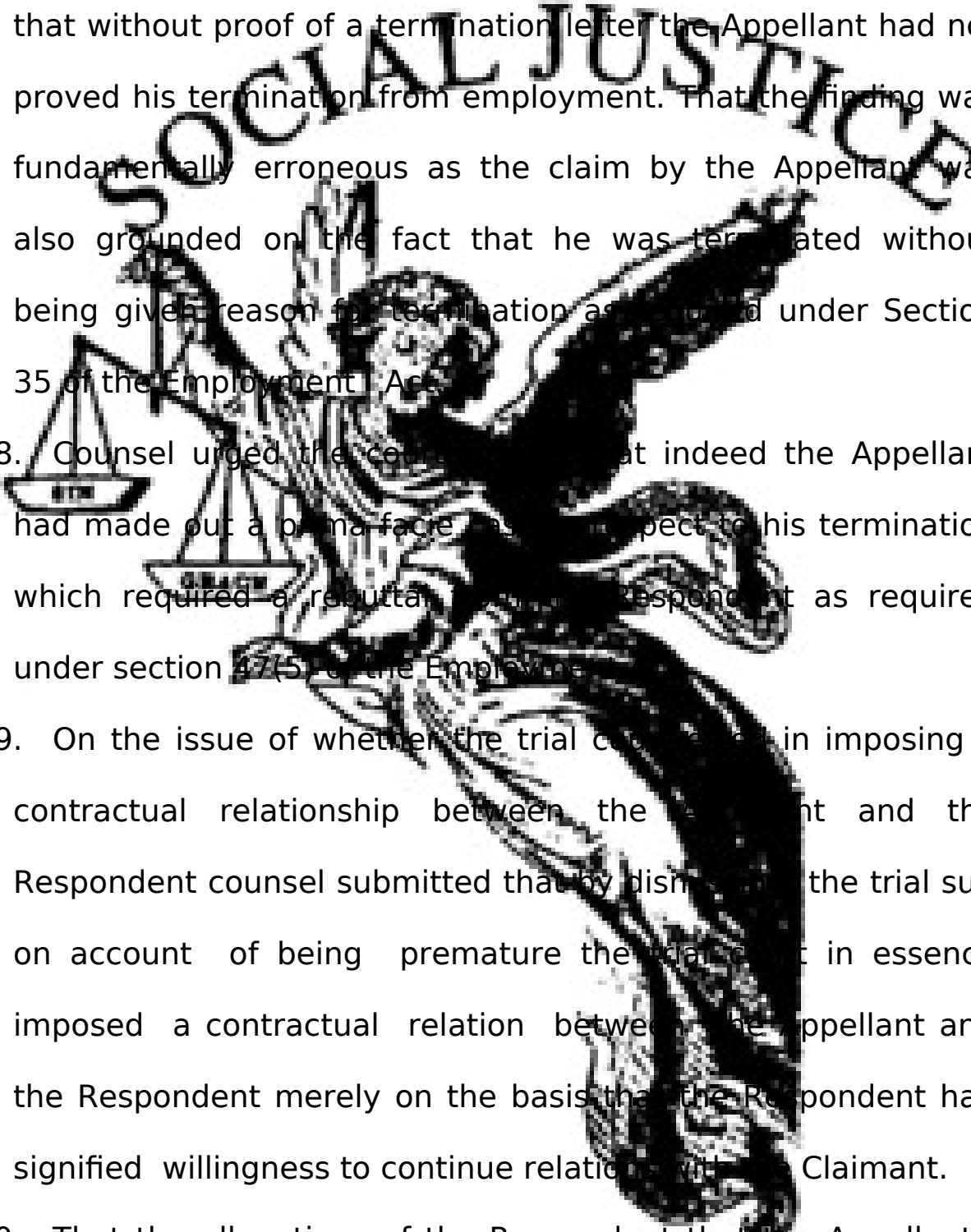
the Respondent took upon the Appellant refusal to undertake the alleged medical review on his suitability to work in his contracted position. The alleged act of refusal to undertake a medical review by the Appellant was in itself a misconduct and the Respondent ought to have tabled evidence to show the effort made to make the Appellant understand that if the medical review was not undertaken certain consequences would ensue such evidence was not tendered at all.

13. Further it was not possible for an employee to be away for so many months without being provided for by the employer if the employee had not been terminated. That even in instances where desertion was used as a defence by the employer, the employer must show the efforts made to find the employee for resolution of the matter. Counsel relied on the cases of **Ronald Nyambu Daudi v Tornado Careers Limited [2019] [2019] KEELRC 2150 (KLR)** and **Selotas Acheha Ikatwa v Charles Peter Otieno [2018] KEELRC 2491 (KLR)** where a similar finding was reached.

14. Counsel submitted that an employer does not have to issue a written termination letter/notice for the court to find that

termination has occurred. The testimony of the Appellant in the trial court demonstrated that the Respondent had effectively terminated his services in view of its actions and conduct.

15. On the issue of whether the trial court erred in finding the Appellant had not provided prima facie evidence of his termination, counsel submitted that the Appellant provided prima facie evidence of his termination in view of the conduct of the Respondent.
16. Counsel submitted that the Respondent in support of its case produced the letter dated 17th January 2022 allegedly requesting the Appellant to undergo a medical review which counsel submitted earlier was not served on the Appellant and the trial court relied on it without investigation. The Appellant never admitted anywhere of having received the letter dated 17th January 2022. That without addressing the issues of service and the contents of the letter dated 17th January 2022 together with the contradictions therein, the Respondent's assertions had no legs to stand on. As a matter of fact the said letter was only signed by the Respondent's witness allegedly on the 19th January 2022.

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17. Counsel submitted that the trial court also made a finding that without proof of a termination letter the Appellant had not proved his termination from employment. That the finding was fundamentally erroneous as the claim by the Appellant was also grounded on the fact that he was terminated without being given reason for termination as provided under Section 35 of the Employment Act.
18. Counsel urged the court to find that indeed the Appellant had made out a prima facie case in respect to his termination which required a rebuttal by the Respondent as required under section 47(5) of the Employment Act.
19. On the issue of whether the trial court was in imposing a contractual relationship between the Respondent and the Respondent counsel submitted that by dismissing the trial suit on account of being premature the court in essence imposed a contractual relation between the Appellant and the Respondent merely on the basis that the Respondent had signified willingness to continue relations with the Claimant.
20. That the allegations of the Respondent that the Appellant's employment was not terminated was a smokescreen aimed at

concealing the truth and also a ploy to escape the wrath of sections 35, 41, 43, 44 and 45 of the Employment Act.

RESPONDENT'S SUBMISSIONS

21. The Respondent's Advocates Nyaencha Waichari & Company Advocates filed written submissions dated 11 November, 2025.
22. Counsel urged the court to review the submissions filed at the trial court. Counsel also relied on the case of **Simon Waweru Mugo vs Alice Mwangi Muveo (2020 eKLR)** on the duty of the first appellate court. That the trial court was right in finding that the Appellant had provided prima facie evidence of unfair termination of his employment as required of him under section 47(5) on the respective burden of proof placed on the employer and employee.
23. Counsel urged the court to uphold the findings of the trial court in view of no evidence of termination of employment having been given by the Appellant and that the burden did not shift to the Respondent to justify the termination. That the Appellant did not lay any basis for the court to disturb the

decision of the trial court hence the appeal should be dismissed with costs.

DETERMINATION AND DISPOSITION

24. The court has considered the grounds in the Appeal, the Record on Appeal and submissions filed by the parties herein and states as before that the principles which guide this court in an appeal from a trial court are now well settled as in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where the Court of Appeal stated:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

25. The Judgment of the trial court was a dismissal of the Appellant’s claim for failure to provide prima facie evidence of unfair termination and that the suit was instituted prematurely as the Respondent demonstrated willingness to continue relations with the Claimant. The Appellant was aggrieved by

this decision and fronted 6 grounds of Appeal. The grounds will be condensed in to two issues namely: –

- a) *Whether the trial court erred in dismissing the Appellant's suit while finding he had not discharged his burden of proof.*
- b) *Whether the trial court erred in not awarding the Appellant his reliefs sought.*

Whether the trial court erred in dismissing the Appellant's suit while finding he had not discharged his burden of proof

26. This court while determining the issue will join it with the issue of whether the Appellant filed the claim prematurely as held by the trial court since they are intertwined. The trial court found that the Appellant did not discharge his burden of proof that he was unfairly terminated by the Respondent on the letter dated 17th January, 2022 where the Respondent had indicated that the Appellant was supposed to go for medical review for him to be assigned lighter duties.

27. Whereas the court noted that the Appellant was reviewed by the Respondent's appointed Hospital and was allowed to continue working at his position in loading/Dispatch and the reason why the Respondent continued paying him from

October, 2021 to January, 2022; the trial court ought to have analyzed the facts well. It was not clear what the purpose of the medical review was if the Appellant was fit to work in his current position.

28. The respective burden of proof for the parties is as governed by section 47(5) of the Employment Act where the Appellant ought to illustrate a termination which was unfair occurred and the Respondent to justify the grounds of the termination. The court of Appeal in **Machafu Isindu v Lavington Security Guards** (2017) 120-71 SKLR explained this burden as follows:

14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination.

“(5) 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 employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
[Emphasis added]

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.

29. It was upon the Appellant to demonstrate that unfair termination occurred before the Respondent could be called upon to justify the grounds of termination. In this particular case the Appellant alleged that he was dismissed on 13th January, 2022 when he was being employed at the Respondent's premises while the Respondent contended that he was to go for the medical review on 15th January, 2022 while the letter of 17th January, 2022 he was required to go for a review on 14th January, 2022.

30. What was clear before this court was that the Appellant did not attend work as from 14th January, 2022 the Respondent did not tender evidence if at all the Appellant was at work on 13th January, 2022 the date he was sent for the medical review. There was no evidence of service of the letter dated 17th January, 2022 to the Appellant who by then was not going to work. The Respondent did not produce evidence of alleged

meetings of 11th and 12th January, 2022 with the Appellant on the said discussions. There was no letter requesting the Appellant to go for the review on 13th January, 2022.

31. This court therefore disagrees with the trial court that the Appellant filed the case prematurely as it was clear that he was dismissed on 13th January, 2022. The Respondent as the custodian of employment records under section 74 of the Employment Act ought to have produced attendance sheets to show that the Appellant was not at work on 13th January, 2022 and he was requested to go for medical review and he refused.

32. The court also appreciates that the Appellant's word in oral contracts is to be taken as truth unless the employer can produce evidence to counter their word. The Appellant therefore discharged his burden of proof under section 47(5) of the Act and it was upon the Respondent to justify the grounds for the termination.

33. The Respondent had a duty under section 47(5) and 47(5) of the Act to justify the grounds of termination and demonstrate the reasons were fair and valid which would lead to unfair

termination under section 45 of the Act if there was no valid reasons and the procedure followed was unfair. The Respondent alleged that the Appellant refused to undergo the medical review on 13th/14th January, 2022. There was no proof of the request to undergo the same or receipt of this letter dated 17th January, 2022 by the Appellant.

34. This court notes that under section 107 of the Evidence Act he who alleges must prove. The Respondent as the employer took no action on the Appellant as he refused to undergo the medical review. There was no show cause letter issued over the same which was a gross oversight. In addition, if the Appellant stopped working on 14th January, 2022 no action was taken by the employer on the absconding employee as per section 44(4)e) of the Act.

35. This court has in a number of times pronounced itself on issues of absconding of duties by an employee with recently the court in the case of **Owudu v Digital Sanitation Services Limited (Appeal No. 109 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) (Judgment)** holding as follows: -

17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.

18. Further, under Section 18(5) (b) of the Act, where the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken the legal duty to properly end employment.

36. In this particular case, notice was issued to the Appellant upon absconding duty or to the Labour Office and his terminal dues deposited therein. In addition, the Appellant absconded duties the Respondent did not demonstrate that it commenced any disciplinary action against the Appellant under Section 41 of the Employment Act after he allegedly failed to report on duty.

37. In **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee

calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

38. In this present case, the Respondent did not illustrate any efforts of contacting the Appellant to inform him that they were considering terminating his service due to absconding duties. The court is not satisfied that the Respondent had on a balance of probabilities discharged its onus of establishing that the Appellant refused to undergo the medical review or absconded duties. The court therefore overrules the trial court's verdict that the Appellant did not discharge his burden of proof that he was unfairly terminated and finds that he discharged his burden and the Respondent failed to prove the grounds for termination of his service, hence it was held to unfair termination under section 45 of the Act. The trial court erred in dismissing his case.

Whether the trial court erred in not awarding the Appellant his reliefs sought.

39. The court after finding that the Appellant was unfairly terminated proceeds to determine which reliefs the Appellant was entitled to. The trial court held that the Appellant's right

salary was Kshs 15,994/= which was the basic salary. The court disagrees with this amount and finds that there was a house allowance of Kshs 2,399/= as per attached pay slips hence the court will base his salary at his gross salary of Kshs 18,394/= as per the pay slips.

40. On the claim for 12 months compensation for unfair termination, this court is guided by section 49 of the Employment Act and the provisions given under section 49(4) of the Act where the length of service among other considerations. In this case the Appellant was employed in July 2020 and was dismissed in January 2022, this was a period of around one and half years hence a small period. Coupled with the finding of unfair termination an award of two months' salary as compensation would be reasonable in the circumstances. The Appellant was entitled to the pay of one month as per section 35 of the Act.

41. On the claim for severance pay the Appellant was not entitled to the same since he was not declared redundant under section 40 of the Employment Act. If at all the Appellant meant service pay the same would not be applicable since he

was a member of NSSF as per the attached pay slips which falls under the exception under section 35(6) of the Act.

42. The Appellant is entitled to certificate of service as per section 51 of the Employment Act.

43. In the upshot the Appeal is found meritorious and is hereby allowed with costs to be Appellant as follows:

- i. One month's salary in lieu of notice.....Kshs 18,394/=
 - ii. Two months' salary compensation for unfair termination.....Kshs 36,788/=
- KShs 55,182/=**

44. It is so ordered.

Dated at Nairobi this 13th day of March 2026

Delivered virtually this 13th day of March 2026

Abuodha Nelson Jorum

Presiding Judge- Appeals Division

