

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E039 OF 2025

ROBEN ABERDARE LIMITED.....APPELLANT

VERSUS

PETER KINGORI WAWERU.....RESPONDENT

(Being an Appeal from the Judgment of the Hon. F.K Munyi, Senior Principal Magistrate in Nyeri Chief Magistrate ELRC Cause No. E036 of 2023, delivered on 17th June 2025)

JUDGMENT

1. The Respondent instituted a suit before the Chief Magistrate’s Court at Nyeri through a Memorandum of Claim in CMEL No. 36 of 2023. In the Claim, the Respondent averred that he had been employed by the Appellant as a heavy commercial driver from 2020 until 2022, when his employment was summarily terminated. He contended that the termination was effected in disregard of the rules of natural justice and that he was not accorded any opportunity to participate in the process leading to the decision.

2. Characterizing his termination as unlawful and unprocedural, the Respondent sought an award of **Kshs 408,264.00**, comprising notice pay, underpayment,

accrued leave, service pay, gratuity, compensation for wrongful loss of employment, and unpaid National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) contributions. He further prayed for compensation for unfair termination, costs of the suit, interest, and the issuance of a certificate of service.

3. The Appellant opposed the Claim through a Statement of Response dated 15th August 2023, asserting that its fuel monitoring system had revealed that the Respondent had been siphoning fuel from motor vehicle registration number KCQ 371R, which had been assigned to him, between August and September 2022.
4. The Appellant further stated that the Respondent was issued with a Notice to Show Cause on 7th September 2022 and was subsequently subjected to a disciplinary hearing on 12th September 2022, after which he was pardoned and reinstated. The Appellant averred that the Respondent later engaged in acts of insubordination, culminating in his summary dismissal on 11th October 2022. The Appellant was of the view that the dismissal was justified on account of gross misconduct.
5. The Appellant further contended that the Respondent was not entitled to the reliefs sought, arguing that the claims were time-barred under Section 90 of the

Employment Act as they constituted continuing injuries. To his end, the Appellant urged the Court to dismiss the Claim with costs, declare the termination lawful and fair, and award it **Kshs 30,066.67** for lost fuel, together with a set-off of **Kshs 7,000.00** from the Respondent's dues.

6. Upon evaluating the evidence on record, the learned trial Magistrate rendered judgment in favour of the Respondent. In its judgment, the trial Court found that the reasons for termination were not valid and that the procedure adopted was unfair, concluding that the Respondent had proved his case on a balance of probabilities. Consequently, the trial Court allowed the Respondent's Claim and awarded him **Kshs 398,411.20** together with costs and interest.

The Appeal

7. Being dissatisfied with the Judgment of the trial Court, the Appellant preferred the instant Appeal, setting out the following seven (7) grounds in support thereof:

- 1) **THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law and thus erroneously dismissing and/or disregarding the Appellant's prayers as**

contained in the Statement of Response, thereby occasioning a gross miscarriage of justice.

- 2) THAT the learned Trial Magistrate erred in law and fact by failing to hold and find that the reliefs/remedies sought by the Respondent were agreed upon and consented to by the Respondent through the County Labour office Nyeri, in view of section 49 of the Employment Act, 2007, thereby occasioning a gross miscarriage of justice.
- 3) THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law by failing to make a finding that the fair procedure was followed in dismissing the Respondent from his employment, thereby occasioning a gross miscarriage of justice.
- 4) THAT the learned Trial Magistrate erred in law and fact by awarding the Respondent 5 months' gross salary as maximum compensation, whereas the Respondent had only pleaded 1 month's salary as compensation for wrongful loss of employment, thereby occasioning a gross miscarriage of justice.

- 5) **THAT the learned Trial Magistrate erred in law and fact by allowing and awarding the Respondent's claim for underpayment, thereby occasioning a gross miscarriage to justice.**
- 6) **THAT the learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the Judgment, thereby occasioning a gross miscarriage of justice.**
- 7) **THAT the learned Trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a gross miscarriage of justice.**

8. To this end, the Appellant seeks the following orders from this Court:

- a) **This Appeal be allowed in its entirety.**
- b) **The said Judgment of the Learned Trial Magistrate Honourable F K Munyi, Senior Principal Magistrate, in Nyeri Chief Magistrate Employment and Labour Relations Cause No. E036 of 2023, delivered on 17th June, 2025, be varied and/or set aside and substitute the same with an order dismissing the Respondent's claim and allowing the Appellant's counter-claim with costs.**
- c) **The Appellant be awarded costs of this Appeal.**

The Submissions

9. The appeal was canvassed through written submissions. Both parties filed their respective submissions, which this Court has considered. On its part, the Appellant submitted that it had sufficiently demonstrated that the Respondent engaged in fuel siphoning from a company vehicle. In the same vein, the Respondent argued that the trial Magistrate failed to properly appreciate this evidence and thereby disregarded material facts placed before the Court. The Appellant further contended that, upon establishing this allegation, the evidentiary burden shifted to the Respondent to rebut the claim.
10. The Appellant also faulted the trial Magistrate for failing to consider and give effect to the conciliated agreement, terming this omission a fundamental misdirection in both fact and law.
11. It was further submitted by the Appellant that due process was followed in effecting the Respondent's termination, and that the trial Magistrate erred in concluding otherwise.
12. Additionally, the Appellant submitted that it had adduced sufficient evidence before the trial Court to establish that the Respondent committed gross misconduct by siphoning fuel, thereby justifying summary dismissal. The

Respondent maintained that the reason for termination was valid, genuine, and lawful, and that the trial Magistrate's finding stemmed from a misapprehension of the evidence and a misapplication of the governing legal principles. In support of the Respondent's submissions, reliance was placed on the case of ***Mary Chemweno Kitui v Kenya Pipeline Company Limited (2014) eKLR.***

13. Citing the case of ***Independent Electoral and Boundaries Commission & another v Mule & 3 others (2014) eKLR***, the Appellant further argued that the trial Magistrate erred in awarding the Respondent the maximum compensation of twelve (12) months' salary, contending that such an award exceeded the relief sought and was manifestly excessive and unsupported by the evidence.

14. The Appellant further submitted that the Respondent was not entitled to any award for underpayment, asserting that his remuneration was consistent with the parties' agreement and that the trial Court's finding effectively rewrote the contract between them.

15. On the other hand, the Respondent submitted that the Appellant failed to produce credible, admissible, and corroborated evidence to substantiate the allegation of fuel siphoning.

16.The Respondent further contended that no binding settlement agreement existed, as no terms were reduced into writing, executed by both parties, or adopted as a consent order of the Court. In the Respondent’s view, conciliation proceedings do not preclude subsequent litigation in the absence of a formal and binding compromise.

17.The Respondent maintained that the termination of his employment was both procedurally and substantively unfair.

18.It was the Respondent’s further submission that the award of five (5) months’ salary as compensation was reasonable, proportionate, and well within the statutory discretion of the Court.

Analysis and determination

19.This being a first appeal, this Court is duty-bound to re-examine and re-evaluate the evidence presented before the trial Court, together with the Judgment, and to arrive at its own independent determination. This position was affirmed in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where it was held that: -

“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.”

20. Accordingly, I am enjoined to re-examine and reconsider the record so as to arrive at my own independent conclusion, bearing in mind that I neither saw nor heard the witnesses testify.

21. With that being said, the Court has reviewed the record, the rival submissions, and the applicable law, and isolated the following issues for determination: -

- a) Whether the Appellant proved before the trial Court that there was a valid and fair reason for terminating the Respondent’s employment;**
- b) Whether the Appellant demonstrated that the Respondent’s dismissal was effected in accordance with due process;**
- c) Whether the trial Court erred in failing to grant the reliefs sought by the Appellant in its Statement of Response; and**
- d) Whether the remedies awarded to the Respondent at the trial court lie in law.**

Valid and fair reason for termination from employment?

22. **Section 43(1) of the Employment Act** places the obligation on an employer to prove the reasons for termination, failing which such termination is deemed unfair. Further, **Section 45(2)** provides that a termination is unfair where the employer fails to demonstrate that the reason for terminating an employee is valid, fair, and related to the employee's conduct, capacity, compatibility, or its operational requirements.

23. In light of these statutory provisions, the Appellant was required to establish that it had a valid and fair reason for terminating the Respondent's employment, and that such reason was connected to his conduct.

24. In its judgment, the trial Court found that the reason advanced for the termination of the Respondent's employment was not valid.

25. The record bears that the Respondent was summarily dismissed on grounds of insubordination. It is worth pointing out at this juncture that the allegation of fuel siphoning from the assigned motor vehicle did not form part of the reasons cited in the letter of summary dismissal. As such, this Court will not consider that allegation under this head, as it did not contribute to the reason for the Respondent's termination from employment.

26. In any event, the Appellant pleaded that it had pardoned the Respondent for the said infraction and subsequently reinstated him. In the circumstances, the issue is deemed to have been conclusively addressed and could not properly serve as a basis for the Respondent's termination from employment.

27. It is apparent from the record that the specific act of insubordination allegedly committed by the Respondent against his superior was not set out in the letter of summary dismissal. What's more, the Appellant did not particularize in its pleadings the nature of the alleged insubordination.

28. It was only during cross-examination that the Appellant's witness, **Ambrose Kinyua Kiongo**, stated that the Respondent had been summoned to explain why he declined to sign certain minutes.

29. Insubordination constitutes a ground for summary dismissal under **Section 44(4)(e) of the Employment Act**, which is couched as follows:

[44](4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.....

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

30. The **Black's Law Dictionary (10th Edition p. 919)** defines insubordination as ***“A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give.”***
31. The Court in the case of ***Dede Esi Annie Amanor-Wilks v Action Aid International [2014] KEELRC 439 (KLR)*** defined the term insubordination as follows: ***“Constant and intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority, amounts to non-verbal insubordination.”***
32. Similarly, in the case of ***Abraham Gumba v Kenya Medical Supplies Authority [2014] KEELRC 463 (KLR)***, the Court adopted the definition of insubordination as articulated by the Mississippi Supreme Court in the case of ***Sims v the Board of Trustees Holly Springs Municipal Separate District School, 414 SO. 2d 431 [Miss. 1982]***, as ***“a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.”***

33.Guided by the foregoing definitions, I now turn to consider whether the Appellant established, to the requisite standard, that the Respondent committed acts of insubordination warranting his termination from employment.

34.As stated herein, the Appellant did not specify the particular acts of insubordination allegedly committed by the Respondent. Further to this, there is no evidence on record showing that the Respondent was expressly instructed by his superior to perform a specific act and willfully refused to do so.

35.In view of the foregoing, this Court finds that the Appellant failed to substantiate its claim that the Respondent engaged in insubordination, warranting dismissal.

36.Overall, the Court has not identified any material evidence on record indicating that the Appellant, at the trial Court, proved on a balance of probabilities that there existed a valid and fair reason to summarily dismiss the Respondent for insubordination.

37.Consequently, the Court sees no basis to disturb the trial Court's finding on this issue.

Procedural fairness?

38. In its judgment, the trial Court found that the procedure employed by the Appellant in effecting the Respondent's dismissal was unfair.

39. The requirement for a fair procedure is generally set out under **Section 45(2)(c) of the Employment Act**. Additionally, Section 41 of the Act prescribes specific procedural obligations for employers, specifically, notifying the employee of the allegations against them and providing an opportunity to respond in the presence of a fellow employee or a shop-floor union representative of their choice.

40. The record bears that the Appellant did not adduce evidence to demonstrate that, following the alleged acts of insubordination, the Respondent was formally put on notice to explain why his employment should not be terminated. Further to this, there is no evidence that the Respondent was summoned to a disciplinary hearing to present his version of events regarding the allegation of insubordination.

41. It should be noted that the only evidence that a disciplinary hearing was conducted by the Appellant at the trial Court relates solely to the allegation of

fuel siphoning, which the Court has already found did not contribute to the termination of the Appellant's employment.

42. It is instructive to note that the minimum requirements of a fair hearing, as set out under Section 41 of the Employment Act and reaffirmed by the Court of Appeal in *Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR*, are:

(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; and

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

43. In the present case, the absence of evidence showing that the Respondent was afforded an opportunity to explain the alleged act of insubordination leads this Court to conclude that the Appellant failed to establish, to the required standard at the trial Court, that the Respondent's dismissal was carried out in accordance with the procedural requirements set out in **Section 41 of the Employment Act**.

44. Accordingly, the trial Magistrate cannot be faulted for concluding that the procedure followed by the Appellant in effecting the Respondent's dismissal was unfair.

Whether the trial Court erred in failing to grant the reliefs sought by the Appellant in its Statement of Response

45. The Appellant has contended that the trial Magistrate erred in law by disregarding the reliefs it sought in its Statement of Response. In this regard, the Appellant has asserted that it had proved that the Respondent was siphoning fuel from the company vehicle assigned to him.

46. It is noteworthy that the Appellant did not file a counterclaim alongside its Statement of Response. The **Black's Law Dictionary (10th Edition, p. 427)** defines a counterclaim as *"A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim."*

47. Indeed, **Rule 29(2)(g) of the Employment and Labour Relations Court (Procedure) Rules, 2024**, contemplates a scenario where a party served with a Statement of Claim (the Respondent) may file a Statement of Response together with a Counterclaim.

48. In the instant case, it is not clear why the Appellant did not file a Counterclaim, as provided under the Court's Rules, if it intended to recover the sum of Kshs 7,000.00 that it now faults the trial Magistrate for not awarding.

49. In light of the above, the Court finds no basis to fault the trial Magistrate for failing to award the Appellant the sum of Kshs 7,000.00, as it was not properly claimed through a Counterclaim.

Whether the remedies awarded to the Respondent by the trial Court lie in law

50. The trial Court, having found that the Respondent's termination lacked a valid reason and was procedurally unfair, awarded him five (5) months' salary for wrongful loss of employment and one (1) month's salary in lieu of notice. Given this Court's finding that the Appellant failed to prove at the trial Court that the termination was valid, fair, and procedural, there is no reason to disturb these awards, which are therefore upheld.

51. The Appellant's argument that the trial Court erred in awarding five (5) months' salary instead of one (1) month as pleaded does not succeed, as the

Respondent sought compensatory damages for unfair termination, which the award properly reflects.

52. The Appellant further contended that the trial Magistrate overlooked that the Respondent had allegedly agreed to the reliefs through the County Labour Officer. Despite the Appellant's assertions, it is notable that the letter from the County Labour Officer dated 11th October 2022 does not bear the signatures of both parties indicating consent. Therefore, there is no evidence that there was a meeting of minds to constitute an enforceable agreement.

53. In addition to the foregoing, there is no evidence that the Appellant acted on the County Labour Officer's letter to settle the payments prior to the Respondent filing suit on 19th July 2023. If indeed the Appellant genuinely considered the letter from the County Labour Officer to represent consent, it is unclear why it did not take any steps to make the payments to the Respondent before the suit was instituted.

54. For these reasons, the Appellant's contention regarding the compensation awarded to the Respondent on account of unfair termination fails.

55. The trial Court further awarded the Respondent 22 days of unpaid leave. The record shows that the Appellant did not produce the Respondent's leave

records, despite its statutory obligation under **Section 74(1)(f) of the Employment Act**. Accordingly, it did not disprove the Respondent's claim for unpaid leave. As such, there is no basis to disturb this award.

56. The Respondent was further awarded **Kshs 184,802.40** for underpaid salary covering 18 months.

57. It is noteworthy that the Appellant did not dispute the Respondent's assertion that his monthly salary was Kshs 20,000.00. It was also uncontested that he was employed as a heavy commercial driver.

58. Under **Legal Notice No. 2 of 2018**, the Respondent was entitled to a minimum consolidated salary, including house allowance, of **Kshs 28,822.10**, based on his posting in Nyeri. There is no evidence that he was based in Nairobi, Mombasa, or Kisumu cities, which would have entitled him to Kshs 30,627.45, as pleaded. While the trial Magistrate correctly found that the Respondent was underpaid, she applied an incorrect salary scale in calculating his dues.

59. Accordingly, the awards in favour of the Respondent will be adjusted to reflect the correct salary scale.

Orders

60. In the final analysis, the Court disallows the Appeal in its entirety and makes the following orders: -

- (a) The award of one (1) month’s salary in lieu of notice is upheld but adjusted to Kshs 28,822.10.**
- (b) The award of compensation equivalent to five (5) months’ salary is upheld but adjusted to Kshs 144,110.50.**
- (c) The award for unpaid annual leave of 22 days is upheld, but adjusted to Kshs 21,136.20.**
- (d) The award for underpayment is upheld but adjusted to Kshs 158,797.80.**
- (e) The total decretal sum of Kshs 398,411.20 is set aside, and the final award is determined at Kshs 352,866.60.**
- (f) Interest on the amount in (e) shall accrue at court rates from the date of this Judgment until full settlement.**

61. As the Appeal has collapsed, costs in this Court and at the trial Court shall be borne by the Appellant and shall be pegged on the final award.

DATED, SIGNED and DELIVERED at NYERI this 24th day of March 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Ms. Njau instructed by Mr. Magua

For the Respondent

No appearance

Court Assistant

Ndati

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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