

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL E121/2024

PARAPET.....APPELLANT

VS

AMOS WAMALWA WANJALA.....RESPONDENT

JUDGMENT

Background

1. Parapet Limited, the appellant, prefers this appeal against the Judgment and Decree of the lower Court [Hon. Sogomo] delivered on 17th May 2024 in the Mombasa Chief Magistrates Employment and Labour Relations Court, Cause No. 755 of 2021.
2. The Respondent, Amos Wamalawa Wanjala, contending that he was an employee of the Appellant at all material times, whose employment it terminated unfairly, sued it in the above-mentioned court, seeking both declaratory and compensatory relief.
3. The Appellant resisted the Respondent's claim through a Reply to Statement of Claim, denying his cause of action and entitlement to the reliefs he had sought.
4. After considering the parties' respective cases, evidence and submissions, the learned trial Court found in favour of the Respondent, in the above-stated judgment. The judgment is the subject matter of this appeal.
5. By consent of the parties, the matter was proceeded with by way of the pleadings, documents and submissions.

The Respondent's Case before the trial Court.

6. He first came into the employment of the Appellant on 1st November 2025, as a skilled Steward, at a monthly salary of KShs. 15,000. The Appellant terminated his employment on 30th December 2020. The termination was not preceded by any notification to him of the Appellant's intention to terminate his employment, nor was he afforded an opportunity to defend himself against the accusations. Additionally, the termination was unjustified. Therefore, the termination was

unfair and unlawful. It failed to meet the statutory requirements of the Employment Act.

7. The Appellant failed to pay him his entitled separation dues, amounting to KShs. 354,000. The Appellant's Case before the trial Court.
8. The Appellant's case was presented through its three witnesses, namely the Regional Manager, the Station Supervisor, and an employee who, at the material time, worked with the Claimant.
9. It was the Appellant's case, based on the statements of the above-mentioned witnesses, that in or about 2015, they secured a contract with the United Nations Support Programme to provide cleaning services at its offices, then located in Mombasa.
10. It was a term of the contract that the Respondent, along with other employees, would be deployed at the offices.
11. In June 2019, the Station Supervisor held a meeting with the employees and notified them that the service provision contract between it and the third party was set to expire in December 2019.
12. The employees were further informed that after the expiry of the contract, they were expected to report to the Appellant's offices in Mombasa on 1st January 2020. The Respondent reported back for redeployment, only to abscond from duty for several months during 2021, save December 2021, and again in February 2022.
13. Upon the desertion, the Station Manager called the Respondent several times in a bid to ascertain his whereabouts, but the effort was not fruitful as the Respondent ignored her calls.
14. By reason of the circumstances, the Respondent's claim for unfair termination and contention that he was entitled to the reliefs he sought in his pleadings were unfounded.

The Judgment of the trial Court.

15. By his judgment above-mentioned, the learned trial Magistrate found that the termination of the Respondent's employment was unfair, and condemned the Appellant to;
 - a) Pay the Appellant one month's salary in lieu of notice, KShs. 15,000.00
 - b) Settle the Respondent's unpaid salary, KShs. 69,000.
 - c) Compensate the Respondent for earned but unutilized leave days, KShs. 52,500.
 - d) Compensation for unfair termination, KShs. 180,000.00
 - e) Pay the Respondent's costs of the suit.

The Appellant's Appeal

16. Aggrieved by the judgment, the Appellant impugns it, setting forth the following principal grounds;
 - i. THAT the learned Magistrate erred in law and fact by finding that the termination of the Respondent's employment was wrongful and unfair.
 - ii. THAT the learned Magistrate erred in law and in fact in failing to find that the Respondent absconded his duties.

- iii. THAT the learned trial Magistrate erred in fact by failing to find that the Claimant did not provide any proof of having been dismissed by the Respondent.
- iv. THAT the learned Magistrate erred in law and fact by failing to find that the Respondent did not owe the Respondent unpaid salaries or leave days.

Analysis and Determination

17. I have carefully considered the Judgment of the lower Court, the record, and submissions by

Counsel for the parties, and hold that the instant appeal revolves around two broad issues;

- i. Whether the learned trial Magistrate erred in his finding that the Respondent's employment was unfairly terminated.
 - ii. Whether the Respondent was entitled to the reliefs that the learned trial Magistrate.
18. This being a first appeal, it is this Court's primary duty to re-evaluate the evidence on the recording order to come to its own independent conclusion on facts and the law.
19. With regard to the first issue, Appellant submits that the trial Court's finding that the Respondent's employment was unfairly terminated, without considering that he deserted from duty. Under section 47[5], the Respondent bore the legal burden to demonstrate that an unfair termination had occurred. He did not. As the legal burdens provided in the Section are sequential, his claim ought to have failed upon the failure, without the evidential burden shifting to the Appellant to prove the reasons for the termination and that the same was valid and fair, pursuant to the stipulations of Sections 43 and 45 of the Employment Act, respectively. To support this submission, reliance has been placed on the case of Josephine M. Ndungu & others v Plan International Inc [2019] KEELRC [KLR].
20. The Respondent did not place forth any sufficient evidence to demonstrate that his employment was unfairly terminated.
21. The Appellant further submits that through the documents that were tendered in evidence, including the log-in sheets, it is clear that the Respondent absconded from duty. Further, the Appellant's second witness tried to reach out to him unsuccessfully.
22. It was further submitted that desertion of duty constitutes gross misconduct and renders the employee liable for summary dismissal. To buttress the submission, reliance has been placed on Banking Insurance & Finance Union [Kenya] v Barclays Bank of Kenya Ltd [2014] KEELRC 1145[KLR].
23. The Respondent submits that under Section 47[5], the employee is only required to place before the Court prima facie evidence suggesting that a termination occurred and that the said termination lacked substantive justification and or procedural fairness. Once the employee discharges this burden, the burden of proof shifts to the employer to justify the termination. To support this position, the Respondent places reliance on the Court of Appeal decision in Muthaiga Country Club v Kudheihia Workers Union [2017] eKLR.

24. The Appellant cannot assert that the Respondent absconded duty in May 2020 and goes ahead to provide pay slips for May and June 2020. This demonstrates that the Respondent worked for the Appellant until December 2020, when his employment was terminated unfairly, without notice and a hearing. The Appellant's contention that the Respondent absconded duty was a disguised attempt to justify the unfair termination.
25. The Appellant did not place forth any sufficient evidence to show the efforts made to trace the Respondent, know his whereabouts, and even notify him that it intended to take disciplinary action against him for his continued absence from duty. If the Appellant indeed made the efforts as alleged, nothing could have been easier than producing a letter addressed to the Respondent, an extract of a call log, or an extract of messages to establish the effort.
26. Where desertion is alleged against an employee, the employee is entitled to a hearing to ensure that due process is observed. The employer should make reasonable attempts to contact the employee.
27. Undoubtedly, as the parties have noted in their submissions, Section 47[5] of the Employment Act establishes a dual burden of proof that applies to both the employee and the employer and must be discharged sequentially. The employee bears the initial burden of proving that an unfair termination occurred. To discharge this burden, the employee need only establish a prima facie case that the termination failed to comply with the requirements of procedural and substantive fairness. Once the employee has discharged this burden, the evidential burden shifts to the employer to justify the termination. Justifying the termination would involve demonstrating the reason for the termination [Section 43 of the Employment Act], that the reason is valid and fair [Section 45 of the Act], and that the decision was not in defiance of equity and justice [Section 45[7]].
28. Elaborating on the import of Section 47[5], the Court of Appeal in the case of *Muthaiga Country Club v Kudheiha Workers Union* [2017] eKLR, stated;
“ The grievants having denied, through their witness, the reasons for their dismissal, discharged their obligation under Section 47[5] of the Act by laying the basis for their claim and that an unfair termination had occurred. This brought to play Section 43[1] and 47[5] of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment and justify the grounds for the termination of employment.”
29. I have thoroughly examined the Respondent's claim regarding the lack of procedural fairness and substantive justification in the termination of his employment, as well as the Appellant's argument that the Respondent absconded duty. Additionally, I have considered what the law required the Appellant [as the employer]to demonstrate in cases of alleged desertion by an employee, along with the Respondent's assertion that their actions did not conform to legal expectations. Based on this review, I have concluded that, before the trial Court, the Respondent successfully established a prima facie case indicating that an unfair termination of his employment had taken place.

30. For good measure, the law requires that an employer asserting that its employee absconded from duty, thereby terminating his or her employment, must demonstrate that it made efforts to trace the employee, inquired about his or her whereabouts, and brought to his or her attention that it contemplated taking action against him or her on the ground of his or her unauthorised absence. This legal duty is not satisfied by a bald assertion that efforts were made. There must be evidence demonstrating those efforts.
31. In my view, all that the Appellant did was to, through his witnesses, make bald allegations that efforts were made to trace and inquire the Respondent's whereabouts without success. One sees no detail as to how and when these efforts were made. The Learned trial Magistrate would not reasonably, therefore, in my view, conclude that the Appellant had proved that the Respondent deserted his employment.
32. I have considered the Appellant's contention that the Respondent absented himself from duty for several months in 2020, for the entire of 2021, save for December 2021, and again in February 2022. This assertion, in my view, makes no sense; no details were given regarding the various months of 2020, or how the Respondent was allowed to return to work in December 2021 after disappearing from work for a whole eleven months. The evidence was sketchy and unconvincing.
33. On the material before the trial court, it is not difficult to conclude that the Appellant did not seek to present any evidence to establish that the Respondent's employment was procedurally terminated in accordance with the provisions of Section 41 of the Employment Act.
34. In the upshot, this Court faults not the learned trial Court's finding that the Respondent's employment was unfairly terminated.
35. The Appellant challenged the reliefs granted to the Respondent on the sole basis that such reliefs are awarded only where a case of unfair termination is established, and that, as the Respondent did not prove his case, the reliefs cannot be availed to him. This reasoning seems not to recognise that the Respondent sought two categories of relief, those dependent on the claim for unfair termination, such as compensation for unfair termination, and those independent of it, such as earned but unpaid leave days and unpaid salary for days worked.
36. However, notwithstanding the foregoing, I am compelled to disturb only one of the reliefs granted by the trial Court, namely the maximum compensation under Section 49[1][c] of the Employment Act. Section 49[1][c] of the Act bestows upon the courts the authority to grant compensatory relief to an employee who has successfully challenged his or her employer's act of unfairly terminating his or her employment. However, it is pertinent to note that the exercise of this authority is discretionary and depends on the circumstances of each case.
37. In making the award, the learned trial Magistrate premised the same on the length of service of the Respondent to the Appellant, which he held was twenty-four months. In my view, considering this sole reason that was advanced, the award of 24 months' gross salary was excessive. I hereby reduce the award of twelve months' gross salary to five months' gross salary, KShs. 75,000.

38. As the appeal is only partially successful, each party shall bear its own costs of this appeal.

Read Signed and Delivered this 9th Day of April 2026.

OCHARO KEBIRA

JUDGE