



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISUMU**

**APPEAL NO. E032 OF 2025**

FULCHAND BOOKSHOP.....

**APPELLANT**

**VERSUS**

CHRISPINE ODUOR ONYANGO...

.....**RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. K. Cheruiyot (SPM) in Kisumu CMELRC NO. E102 OF 2025 delivered on 23<sup>rd</sup> April 2025)*

**JUDGMENT**

1. This appeal arises from the Judgment of Hon. K. Cheruiyot (SPM) delivered on 23<sup>rd</sup> April 2025 in **Kisumu CMELRC No. E102 of 2025, Chrispine Oduor Onyango v Fulchand**

**Bookshop.** Aggrieved by that decision, the Appellant lodged a Memorandum of Appeal dated 3<sup>rd</sup> June 2025 setting out the following grounds:

- (1) *That the learned Magistrate erred in law and fact and/or applied wrong principles and parameters and/or misapprehended the law and /or facts when he found that the Claimant/Respondent had been dismissed and that dismissal was unfair and unlawful.*
- (2) *That the learned Magistrate erred in law and fact and/or applied wrong principles and parameters by awarding the Claimant/Respondent Kshs. 23,000/- as 1 months' pay in lieu of notice thereby disregarding the fact that the Respondent had not been terminated or dismissed.*
- (3) *That the Learned Trial Magistrate erred in law and fact when he held that the Appellant had not furnished medical evidence demonstrating that the Respondent was incapable of working and had been persistently absent on sick leave for an inordinate and extended period.*

- (4) *That the Learned Trial Magistrate erred in law and fact in disregarding the provisions of section 30 of the Employment Act 2007 and in failing to find that the Respondent had failed and/or refused to furnish a certificate of incapacity as required by law despite the Appellant's requests for the document.*
- (5) *That the learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant in awarding the Claimant/Respondent the maximum of 12 months' salary as compensation for unfair termination without any reasoning analysis, and an additional sum in respect of loss of employment of Kshs. 230,000/- which award is unsupported in law.*
- (6) *That the learned Magistrate erred in law and in fact and/or applied wrong principles and/or failed to consider and/or misapprehended the evidence adduced by the Respondent/Appellant when he awarded the Claimant/Respondent Kshs. 57,000/- as*

*service pay despite evidence demonstrating that the Appellant had been paying the NSSF monthly.*

2. On the basis of these grounds, the Appellant urges the Court to allow the appeal and set aside the Trial Court's Judgment. It also urges the Court to award it costs of the appeal.
3. The appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant identifies the following twin issues for determination:
  - a. Whether the Respondent was unlawfully terminated from employment; and
  - b. Whether the Respondent is entitled to the reliefs sought.
5. On the first issue, the Appellant submits that the Respondents employment was not unlawfully terminated. On the contrary, it asserts that the Respondent failed in his duty to procure and avail a medical certificate confirming his fitness to resume work, as required under section 30 of the

Employment Act, despite being requested to do so. It maintains that a sick employee is only protected from summary dismissal under section 44(4) of the Employment Act upon compliance with section 30 of the Act. In support of this position, the Appellant relies on **Calister Nyatichi Oriku v EPCO Builders Limited [2018] KEELRC 1194**, where the Court held that an employee absent from work on account of illness must communicate the absence within a reasonable time and, upon resumption, provide a medical certificate to justify such absence.

6. With regard to the reliefs sought, the Appellant submits that the Respondent is not entitled to any, as he was neither summarily dismissed nor terminated from employment. Concerning service pay, the Appellant contends that the claim is untenable, as the Respondent was a contributor to NSSF. In any event, it argues that the claim for gratuity for the alleged five-year period is time-barred under section 90 of the Employment Act.

#### Respondent's Submissions

7. The Respondent, on his part, submits that the appeal turns on two issues:
- a. Whether his employment was terminated, and
  - b. Whether such termination was arbitrary, unlawful, and/or irregular.
8. On the issue of termination, the Respondent contends that termination is not in dispute. He asserts that it was based on the recommendation of the Appellant's manager. He refers to the manager's testimony that, upon the Respondent's return to work on 28<sup>th</sup> February 2024, he subjected him to a test drive, assessed his performance, and concluded that he should not continue serving as a driver.
9. Regarding the manner of termination, the Respondent submits that illness, by itself, does not constitute a fair reason for termination unless it renders an employee incapable of performing his duties, even with reasonable accommodation. On this basis, he contends that his termination was unfair within the meaning of section 45 of the Employment Act. The Respondent further submits that the Appellant was required to comply with the conditions set

out in **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] KEELRC 810 (KLR)**, to the effect that the employer must support the employee's recovery and return to duty, subject the employee to a specific medical examination to assess his capacity to resume work within a foreseeable period, and issue specific notice of the impending termination. He asserts that, instead, the Appellant merely conducted a test drive and reached a unilateral conclusion on his capacity, without medical evaluation or reasonable accommodation, contrary to the principles articulated in **Kennedy Nyanguncha** (*supra*).

10. With respect to procedural fairness, the Respondent submits that he was neither issued with prior notice outlining the reasons for termination nor afforded an opportunity to be heard in the presence of a fellow employee or a representative of his choice. He maintains that the entire process fell short of the statutory procedural safeguards and was therefore unlawful.
11. In response to the Appellant's reliance on sections 44(4) and 30 of the Employment Act, and the authorities it cited,

the Respondent submits that they are inapplicable. He asserts that they concern summary dismissal arising from absenteeism without lawful cause or failure to produce a certificate of incapacity, whereas in this case, termination arose from alleged incapacity without adherence to due process.

12. On remedies, the Respondent submits that he is entitled to salary in lieu of notice, as no notice was issued prior to termination. He further contends that he is entitled to damages for wrongful and unfair termination, having demonstrated that the termination was both substantively and procedurally unfair. In conclusion, the Respondent urges the Court to dismiss the appeal with costs.

### Disposition

13. This being a first appeal, this Court as the appellate court is obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at its own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** 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]

14. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence the parties 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.

15. The appeal turns on the singular aspect of whether there was a valid and lawful termination. The determination of that

point will have the natural consequence of either overturning the Trial Court or affirming the decision made.

16. The Respondent was stated to have been found unfit to perform his duties. Under the Employment Act, when an employee is found to have an infirmity that employee must be accorded the safeguards under section 41.

*41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

17. There was no evidence adduced before the Learned Magistrate that the Appellant gave the employee this explanation. The Learned Magistrate was therefore correct in his surmise that there was an unlawful termination of the employee in terms of sections 41, 43 and 45 of the

Employment Act. The Appellant ought to have done more to accommodate the Respondent instead of summarily determining the Respondent was unable to work. The amounts awarded are reasonable granted the abrupt and unreasonable manner of termination.

18. The foregoing is ample that the appeal is for dismissal. The final order is that the Appeal is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Kisumu this 22<sup>nd</sup> day of April**

**2026**

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