

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E221 OF 2025

FREDRICK MUTSAMI EGOBWA.....APPELLANT

VERSUS

ESRI STAR LIMITED.....RESPONDENT

**[Being an appeal from the judgment of Hon. Emily Mwamuye delivered on
30th October 2025 in Mombasa CMELRC E436 of 2024]**

JUDGMENT

The appeal arises from a judgment delivered on 30th October 2025 in Mombasa CMELRC No. E436 of 2024. The Appellant seeks that the judgment be set aside, a fresh review be conducted, and the orders sought be allowed. The appeal is that the learned magistrate erred in law and fact by finding that the Appellant had absconded from duty despite the Respondent failing to show that it sent any communications to him to report back to work. The trial court hence failed to find that there was unfair termination of employment before the summary dismissal, and thus failed to assess the terminal dues.

The Appellant had filed a claim before the trial court on the Basis that he was employed by the Respondent on 13th January 2023 as a heavy commercial driver

earning Ksh. 25,000 per month. He was paid below the minimum wage for the position allocated for a heavy commercial driver as regulated under Legal Notice No. 125 of 2022. His claim was that he worked for the Respondent until 1st June 2024, when his employment was terminated without due process. The Appellant became unwell, and upon seeking medical attention, he was informed at the hospital that his NHIF cover was not paid for, and he had to pay in cash. He visited the Respondent's office regarding unpaid NHIF dues, but he met the director, Salim Salim, who became angry and ordered him to leave the premises, stating that his services would no longer be required. He was not taken through the due process. During the employment period, wages were never paid in full, resulting in underpayments. The employment was terminated unfairly, and the Appellant claimed the following:

- a) Note pay Ksh. 25,000.
- b) Unpaid leave for 21 days sh. 17,500.
- c) Underpayment for 16 months Kh. 148,844.
- d) Unremitted NHIF for 16 months Ksh. 8,000.
- e) Service pay for 1.5 years Ksh. 18,750.
- f) House allowance at 15% Ksh. 60,000.
- g) 12 months' compensation Ksh. 300,000.
- h) Costs.

In response and counterclaim, the Respondent contends that the Appellant deserted

duty on 15th May 2024 and was called several times to resume duty but failed to respond. He resorted to attending a disciplinary hearing. The claim is defective and an abuse of the court process after deserting duty. Such was in breach of the employment contract, and the claims made should be dismissed with costs.

In the counterclaim, the Respondents' case is that the Appellant deserted duty and failed to issue notice, forcing it to incur unnecessary expenses. The Appellant caused motor vehicle registration No. KDC 543U damage and loss, which is the property of the Respondent. For the damage, the Respondent incurred Ksh. 400,253 in repairs, and despite several notices to resume duty and address the same, the Appellant failed to address. The Respondent is counterclaiming the following:

- a) Note pay Ksh.40,356
- b) Loss to motor vehicle KDC 543U Ksh. 400,253.
- c) General damages for breach of contract.
- d) Costs of the suit ad counterclaim.

The Appellant replied to the response and counterclaim, denying the allegations. The alleged loss was never brought to his attention and hence not justified.

The learned magistrate heard the party's and held that the Appellant only testified to the fact that he had gone to hospital and could not be treated since the Respondent had not paid NHIF. He did not report back to work, leading to

desertion of duty. He was paid through a voucher on 30 April 2024, a sum of Ksh. 3,900 sent via Mpesa as advance payments. There was thus no evidence of termination of employment as alleged. The trial court found the Appellant had not discharged his burden of proof, and hence dismissed his claim.

Both parties filed written submissions.

Determination

This being a first appeal, the court is required to review the record, reassess the findings and reach its conclusion. However, consider that the trial court had the opportunity to hear and see the witnesses give evidence in court.

The Appellant testified that he sought medical attention but could not be treated at the facility since the Respondent had not remitted NHIF dues. He reported the same to the respondent but instead of addressing, he was chased away.

The Respondent asserts that on 15th May 2024, the Appellant deserted duty. Effort to trace him to attend disciplinary hearing were not successful. He effectively deserted duty after causing damage to the allocated motor vehicle KDC 543U leading to a loss of Ksh. 400,253 and failed to issue notice hence counterclaimed for the loss and notice pay of Ksh. 40,356.

An employee who deserts duty commits gross misconduct and is in breach of the employment contract contrary to section 44(3) and (4) of the Employment Act (the Act). However, the employer should issue notice to the employee to

allow him attend and show cause why employment should not be terminated for gross misconduct ad by summary dismissal pursuant to section 41(2) of the Act:

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The Respondent asserts that upon the alleged desertion of duty, efforts to trace him and invited to a disciplinary hearing were put in place but the Appellant failed to attend.

Upon searching for the employee to attend disciplinary hearing, the employer has a duty to bring closure to the employment relationship through notice terminating employment. such notice must be served to the employee through the last address pursuant to section 10 of the Act and the notice served upon the Labour Officer in terms of section 18(5)(b) of the Act:

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for

the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.

These notices are crucial because they insulate the employer from a claim of alleged unfair termination of employment. Where indeed the employee deserts duty, absconds work or is absent without any justification, the employer is bound to act and terminate the employment relationship. Without taking these steps, the result is unlawful and unfair termination of employment.

The claim by the Appellant is justified. He is entitled to notice pay and compensation.

The Appellant was employed as a heavy commercial driver. Indeed, the Respondent in counterclaim is seeking notice pay of Ksh. 40,356 in recognition of that fact.

For the unfair termination of employment, the Appellant having worked for 16 months only, compensation at 2 months gross wage of Ksh. 40,356 is found appropriate all at Ksh. 80,712.

Notice pay is due at Ksh. 40,356.

On the claim for underpayments for 16 months, this is a continuing injury as defined in **The German School Society & another v Ohany & another**

[2023] KECA 894 (KLR) and in Muthee v Kenya Power & Lighting Company Ltd [2025] KEELRC 3342 (KLR) that:

“The principles underlying continuing wrongs and recurring/successive wrongs have been applied in employment disputes. A ‘continuing wrong’ refers to a single wrongful act that results in a continuing injury, while ‘recurring or successive wrongs’ are those that occur periodically, with each instance giving rise to a distinct and separate cause of action.”

The Appellant is only entitled to the claim of underpayment for 12 months only. This includes the due house allowance. From the wage of Ksh 25,000 that was paid instead of Ksh. 40,356, there was an underpayment of Ksh. 184,272 inclusive of the due house allowance.

On the claim for unremitted dues to NHIF, this are due to the statutory body.

The Appellant has claimed service pay which is due where NHF is not paid. For the one full year of service, the sum of Ksh. 20,178 is due in service pay.

On costs, the appeal successful s addressed above, the Appellant is entitled to his costs.

As stated above, this being a second appeal, the court is allowed to review the entire record. The trial court did not address the counterclaim and equally, there is no counter-appeal.

Accordingly, the appeal is allowed and the judgment in Mombasa CMELRC

No. E436 of 2024 set aside with the following orders:

- a) Employment of the Appellant was terminated unlawfully and unfairly.**
- b) Compensation Ksh. 80,712.**
- c) Notice pay Ksh. 40,356.**
- d) Underpayments including house allowance Ksh. 184,272.**
- e) Service pay Ksh. 20,178.**
- f) Costs of the suit before the trial court and for this appeal.**

Delivered in open court at Nairobi, this 23rd day of April 2026

**M. MBARŪ
JUDGE**

In the presence of:

Court Assistant: Catherine and Omar

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