

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

*(Before Hon. Lady Justice Monica Mbarũ)*

**APPEAL NO. E219 OF 2025**

**KITUKU MUTISYA..... APPELLANT**

*VERSUS*

**RASHID AMIR TRANSPORTERS LIMITED.....RESPONDENT**

**[Being an appeal from the judgment of Hon. Emily Mwamuye delivered on  
30<sup>th</sup> October 2025 in Mombasa CMELRC No. E646 of 2023]**

**JUDGMENT**

The appeal arises from the judgment delivered on 30<sup>th</sup> October 2025 in Mombasa CMELRC No. E646 of 2023. The Appellant raises 6 grounds of appeal that the judgment should be set aside, and the claims made reassessed because the learned trial magistrate erred in law and fact by finding that the Appellant terminated his employment by absconding from duty, whereas the Respondent had failed to demonstrate how such a matter was addressed or make a report to the labour office. Despite being dismissed from work, the trial court failed to apply the evidence before it and dismissed the suit without assessing the Appellant's claims.

The Appellant filed his claim on 6<sup>th</sup> January 2018, alleging that he was employed by the Respondent as a long-distance truck driver. He was assigned a motor vehicle registration No. KBU 401W/ZE3013. His duties included transporting goods within East Africa. His salary was Ksh. 35,221 per month. However, on 6<sup>th</sup> May 2021, the Appellant was involved in a road traffic accident in which the assigned motor vehicle experienced a brake failure, lost control, and overturned near Konza along the Mombasa – Nairobi highway. The Appellant was admitted to the hospital with serious injuries. On 15<sup>th</sup> June 2021, the Appellant reported back to work after recovery, but the director, Rashid Amir, informed him that his employment had been terminated. Amir accused the Appellant of being careless and causing the accident and damage to the assigned motor vehicle. This resulted in the unfair termination of employment without due process. The Appellant claimed the following:

- a) Notice pay Ksh. 35,221.
- b) House allowance for 42 months Kh. 221,892.30.
- c) Unpaid leave for 3.5 years Ksh. 86,289.
- d) 12 months' compensation Ksh. 422,652.
- e) Unremitted NHIF for 42 months, Ksh. 42,000.
- f) Service pay for 3.5 years Ksh. 61,636.75.
- g) Certificate of service.
- h) Costs of the suit.

In reply, the Respondent's case was that they employed the Appellant on 21<sup>st</sup> July 2020 and issued him with a letter of appointment dated 1<sup>st</sup> August 2020. As part of the onboarding procedures, the Appellant was required to provide a guarantor, and he presented Boniface Muinde, who signed the letter dated 10<sup>th</sup> August 2020 to confirm that he was the guarantor. There was no employment form from 6<sup>th</sup> January 2018 as alleged. His employment was not terminated, but he absconded from duty. Under the contract of employment, there was a gross wage of Ksh. 35,221, including house allowance. The wage was subject to statutory deductions including NHIF, NSSF and PAYE. Upon desertion of duty, the Appellant's claims have no merit.

The learned magistrate heard the parties and held that there was desertion of duty. Although the employer should demonstrate the efforts made to trace the employee, the Appellant reported that he had been involved in an accident and only returned to work on 15<sup>th</sup> June 2021. There was no proof of his allegations, and thus, he failed to discharge his burden of proving unfair termination of employment. The suit was dismissed.

On appeal, the Appellant submitted that his employment was unfairly terminated after he was involved in an accident on the Mombasa–Nairobi highway at Konza. After the accident on 6<sup>th</sup> May 2021, he was admitted to the hospital and upon discharge, he reported to work on 15<sup>th</sup> June 2021 but was sent away. The trial court held that he had deserted duty without analyzing the

evidence. The Respondent did not demonstrate what steps were taken to trace him, as held in **Godfrey Anjere v Unique Suppliers Limited [2015] eKLR** and **Joseph Nzioka v Smart Coatings Limited [2017] eKLR**. The allegations that the employee deserted duty require the employer to reasonably prove the efforts made to contact the employee. See **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR**.

The Appellant submitted that the Respondent alleged the Appellant abandoned work without reporting to the labour officer. The trial court erred in its findings; the same should be set aside, and the claims reassessed with costs.

The Respondent submitted that the Appellant failed to prove that his employment had been terminated unfairly as required under sections 107 and 108 of the Evidence Act. Under section 47(5) of the Employment Act (the Act), the employee bears the burden of proving that the termination of employment is unfair. Only then is the employer required to discharge its burden of proof as held in **Lockwood Girls High School v Wasike [2024] eKLR**. Thus, without the Appellant discharging his burden of proof, the application of section 47(5) of the Act did not require the Respondent to justify the grounds and reasons for termination of employment as held in **Kitui Flour Mills Limited v Abdulla [2024] eKLR**.

The Respondent assessed the Appellant's claims well and found no merit. The dismissed suit was justified.

### **Determination**

As this is a first appeal, the court may reassess the findings and reach a conclusion. However, take into account that the trial court had the opportunity to see and hear the witnesses testify.

The Appellant asserts that, as a long-distance truck driver employed by the Respondent, he was involved in an accident on 6<sup>th</sup> May 2021 at Konza along the Mombasa–Nairobi highway. He suffered injuries and was admitted to the hospital. He recovered, and on 15<sup>th</sup> June 2021, he reported to work but was sent away. This resulted in unfair termination of employment. The claims made should be assessed on merit.

The Respondent asserts that the Appellant absconded from duty. His employment was not terminated as alleged, and his claims are without merit.

The Appellant, as the claimant, had to discharge his burden of proof under section 47(5) of the Act. That, indeed, his employment was terminated unfairly by the Respondent.

He asserts that he had an accident while on duty on 6<sup>th</sup> May 2021. He only got well on 15<sup>th</sup> June 2021 and reported back to work.

One right secured under the Act is that of a sick, ill, or injured employee seeking medical assistance. Sections 30 and 34 of the Act give the employee a right to be absent from work due to sickness or illness, as held in **Koeth v Majlis Manda Island Resort Limited [2025] KEELRC 2988 (KLR)** and the case of **Andrew Ogola Makomere v Agro Industrial Tools Limited [2017] KEELRC 1996 (KLR)**.

However, the employee must cause such absence to be reported to the employee within a reasonable time. A third party may make such a report to the employer. The employee is sick or ill and hence cannot be at work when required. See in **Dorothy Ndung’u v Machakos University College [2016] eKLR**, the court held that;

*“When an employee is sick, the duty is on the employer to ensure that there is sufficient medical attention and time off for the employee to recuperate. Where an employee has to attend for medical attention, such has to be brought to the attention of the employer within a reasonable time and even a third party is allowed to communicate such information to the employer*

And in **Rodgers Titus Wasike v General Motors E.A. Limited, Cause No.1322 of 2014** held that;

*“A third party is allowed to attend before an employer and make presentations on the same [when an employee is sick]. Indeed the law goes further to allow an employee who is sick or unwell to have up to 30 days away but upon return must submit particular documents, a medical certificate from a medical practitioner. Such I find to be quite open and generous to meet. Otherwise, an employee will claim illness without taking the necessary steps and absconds duty and when put to task, claim a violation of constitutional and legal right. The law is not only meant to address an employee’s rights, the law serves both parties to an employment relationship and rights at the work place.*

To secure the employee who is sick, under section 34 of the Act, the employee is required to submit a Medical Certificate from a recognized medical facility to the employer. Where the employee is absent for a period, he must submit a sick leave sheet to the employer.

In this case, the Appellant’s evidence is that he got into an accident, was injured and was admitted to the hospital. This was on 6<sup>th</sup> May 2021.

In support of his claim, the Appellant filed various medical records, including a police abstract form. However, when he was cross-examined in evidence, he admitted that, following the accident on 6<sup>th</sup> May 2021, he did not inform the

employer, the Respondent. He did not submit any medical records to the employer. He stated that:

*“... I did inform the director of the Respondent. ... I informed them I was in the hospital. I do not have proof of the same.”*

*Did you tell Boniface that you were not coming to work? He was not picking up my phone. I do not have evidence of the same. I did not do my duties for a long time. ...”*

Essentially, the Medical Certificate and the sick leave sheets would have secured the Appellant.

Being absent from work for reasons of sickness must be accompanied by proof. Being absent from work without permission of the employer is defined as gross misconduct under section 44(4)(1) of the Act. see **Chemengich v Radar Limited [2025] KEELRC 638 (KLR)**.

In this case, without the Appellant producing the records necessary under sections 30 and 34 of the Act, his absence from work due to alleged illness and sickness was not secured. Under section 47(5) of the Act, the alleged unfair termination of employment was without proof. Without establishing a prima facie case, the Respondent, as the employer, had no duty to justify the termination of employment.

The trial court's findings cannot be faulted. Notice pay and compensation are not due.

However, whatever the reasons for the termination of employment, the terminal dues claimed should have been assessed on the merits. This is a requirement under section 18 of the Act. Even in a serious case of gross misconduct, each claim made must be addressed.

On the claim for house allowance for 42 months, the Appellant pleaded that his gross wage was Kh. 35,211 per month. As a truck driver, such a wage was commensurate with the Minimum wage, inclusive of a house allowance.

Regarding the claim for unpaid leave for 3.5 months, this is indeed a right under section 28 of the Act. The Respondent did not produce any leave records. Under section 28(4) of the Act, the Appellant was entitled to 18 months of leave at 33 days based on the basic wage of Ksh. 30,627. This amounts to Ksh. 33,689.70 in leave pay.

Regarding the claim for unremitted NHIF dues, this falls under the statutory body.

On the claim for service pay, the Respondent submitted a payment statement. Part of the dues deducted from the Appellant included the statutory dues. Service pay is not due.

A certificate of service should be issued at the end of employment.

On costs, save for the leave pay awarded, the appeal has no merit. Each party should meet its costs.

**Accordingly, the appeal is without merit. Judgment in Mombasa CMELRC No. E646 of 2023 is affirmed, save for the award of leave pay at Ksh. 33,689.70. Each party to bear its costs.**

Delivered in open court at Nairobi, this 23<sup>rd</sup> day of April 2026

**M. MBARŪ  
JUDGE**

**In the presence of:**

Court Assistant: Catherine and Omar

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