

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**  
**ELRC APPEAL NO. E001 OF 2025**

**BETWEEN**

**PATRICK NDEREBA.....APPELLANT**

**AND**

**BOARD OF MANAGEMENT MIRURIIRI**

**GIRLS SECONDARY SCHOOL.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. M.C Nyigei (PM)  
delivered on 6<sup>th</sup> February 2025 in Meru ELRC No. E005 of 2023)*

**JUDGMENT**

1. The Appellant instituted proceedings against the Respondent before the Chief Magistrate’s Court at Meru in *CMELR Cause No. 5 of 2023 Partick Ndereba v the Board of Management, Miruriiri Girls Secondary School*. In his Memorandum of Claim, the Appellant averred that he was employed by the Respondent as a school driver from 9<sup>th</sup> September 2019 until March 2023, during which period he discharged his duties diligently and to the Respondent’s satisfaction.

2. He averred that by a letter dated 25<sup>th</sup> March 2023, the Respondent summarily dismissed him from employment. It was the Appellant's contention that prior to this dismissal, the Respondent had constructively terminated his employment by redeploying him to man the gate, which duties fell outside his role as a school bus driver. He further stated that before this redeployment, the Respondent's principal had issued him with a Notice to Show Cause following the repossession of the school bus.
3. The Appellant further averred that by a letter dated 29<sup>th</sup> March 2023, he was instructed to stay away from the school premises until 6<sup>th</sup> April 2023, when a disciplinary hearing was scheduled. He was thereafter dismissed from employment.
4. According to the Appellant, the termination of his employment was not conducted in accordance with due process. He further contended that he was not furnished with the evidence supporting the allegations of misconduct against him.
5. The Appellant further alleged that he was paid below the statutory minimum wage and that the Respondent failed to remit statutory deductions despite making the requisite deductions from his salary.

6. He further contended that the Respondent did not reinstate him to his position as a school driver upon recovery of the school bus.
7. On account of the foregoing, the Appellant sought a total sum of **Kshs 630,574/-**-comprising notice pay, two months' unpaid salary, compensation for unfair termination, service pay, accrued leave, and underpayments. He also sought declaratory reliefs that his dismissal was unlawful and unfair and that his remuneration fell below the statutory minimum wage, together with interest and costs of the suit.
8. The Respondent opposed the claim through a Statement of Defence dated 25<sup>th</sup> July 2023, asserting that the Appellant was guilty of insubordination. The Respondent contended that the Appellant absconded duty following the repossession of the school bus by Capital SACCO, which had financed its purchase through a loan facility.
9. The Respondent further asserted that the Appellant's contract of employment permitted his supervisor to assign him other duties.
10. It was the Respondent's further assertion that the Appellant declined the redeployment to gate duties and absented himself from work without authority, thereby necessitating disciplinary action.

11.The Respondent further contended that the Appellant’s dismissal was justified on account of abscondment of duty and insubordination. The Respondent further stated that the Appellant was aware of the allegations against him, responded to the same by way of a letter dated 6<sup>th</sup> March 2023, attended the disciplinary hearing, but chose not to present a defence.

12.The Respondent further denied owing the Appellant any money and urged the court to dismiss the claim with costs.

13.During the trial, both parties tendered oral evidence which was subjected to cross-examination. The Appellant testified in support of his case, while the Respondent called its secretary/school principal, **Mercy Muthuri**, as its witness. Upon conclusion of the oral hearing, the parties filed written submissions, after which the trial court proceeded to evaluate and analyse the evidence on record.

14.Ultimately, the trial court dismissed the Appellant’s claim and directed that each party bears its own costs. In its judgment, the learned trial Magistrate found that the Appellant’s summary dismissal was both lawful and fair.

## **The Appeal**

15. Aggrieved by the findings and orders of the trial Court, the Appellant has preferred this Appeal on fifteen (15) grounds as set out in the Memorandum of Appeal dated 18<sup>th</sup> February 2025:

- 1) The learned Magistrate erred in law and in fact by holding that the appellant's dismissal by the respondent was lawful and fair against the weight of evidence.**
- 2) That the learned Magistrate erred in law and fact by failing to consider the fact that the respondent's action of deploying the appellant to man the gate was against his job description hence tantamount to constructive dismissal.**
- 3) That the learned Magistrate erred in law and fact by shifting the burden of proof to the claimant against section 10(7) of the Employment Act.**
- 4) That the learned Magistrate erred in law and fact by failing to consider whether the reasons for termination of the appellant were justified by the respondent.**
- 5) That the learned Magistrate erred in law and fact by failing to consider that there was no statement on disciplinary rules by the**

- respondent that were applied in the appellant's disciplinary proceedings.
- 6) That the learned Magistrate erred in law and fact by failing to award the appellant 2 months' salary arrears despite the respondent's failure to prove payment of the same.
  - 7) That the learned Magistrate erred in law and fact by dismissing the appellant's claim for underpayment, without giving reasons.
  - 8) That the learned Magistrate erred in law and fact by dismissing the appellant's prayer for service pay without reasons.
  - 9) That the learned Magistrate erred in law and fact by finding that the disciplinary hearing proceedings against the appellant were proper.
  - 10) That the learned Magistrate erred in fact and law by failing to consider the appellant's submissions and distinguishing the authorities thereof.
  - 11) That the learned Magistrate erred in law and fact by failing to consider the fact that the respondent did not call and lead any evidence in support of the accusation against the appellant during disciplinary proceedings hence making them flawed in both substance and procedure.

- 12) That the learned Magistrate erred in fact and law by failing to consider and analyse the claimant's evidence.
- 13) That the learned Magistrate erred in law and fact by dismissing the claimants' whole claim against the weight of the evidence.
- 14) That the learned Magistrate erred in law and fact by finding that the respondent had justified and proved the grounds for summary dismissal of the appellant.
- 15) That the learned Magistrate erred in law and fact by finding that the appellant had not proved his claim against the respondent.

16. Accordingly, the Appellant seeks the following orders from this Court:

- 1) The appeal be allowed and Judgement delivered by the trial court on 6<sup>th</sup> February 2025 and the subsequent decree be set aside and the appellants' appeal be allowed in terms of the prayers sought in the claimant.
- 2) The respondent pays for the costs of this appeal.

### **The Submissions**

17. The appeal was canvassed by way of written submissions. On the Appellant's part, it was contended that the trial court erred in both law and fact in finding

that his dismissal was lawful and fair. He argued that the disciplinary process was procedurally unfair, as he was not furnished with the allegations and supporting evidence in good time to enable him prepare his defence, despite having written in advance requesting the same. He further asserted that neither he nor his representative was afforded adequate time to respond to the allegations. Additionally, he contended that the charges were increased to six during the disciplinary hearing, whereas the invitation letter had only cited a single allegation.

18. The Appellant further submitted that no oral or documentary evidence was presented during the disciplinary proceedings, making it unclear how the Respondent arrived at the decision to dismiss him. He also argued that no staff register was produced either during the disciplinary process or in court to substantiate the allegation of chronic lateness.

19. Relying on the case of *Mbeu v Bingwa SACCO Limited (2023) KEELRC 1403 (KLR)*, the Appellant submitted that under Section 10(7) of the Employment Act, the burden lay on the Respondent to produce a written contract or otherwise prove the alleged terms of employment. The Appellant contended that the Respondent failed to discharge this obligation and that the trial court did not address this issue, thereby arriving at an erroneous conclusion.

20.The Appellant further asserted that he had not been paid two months' salary prior to his dismissal. On this score, he argued that, as the custodian of employment and payment records, the Respondent bore the responsibility of producing such records to rebut his claim, which it failed to do.

21.It was the Appellant's further submission that the repossession of the school bus could not constitute a valid ground for summary dismissal. It was the Appellant's position that his subsequent deployment to gate duties was a clever way of dismissing him through constructive dismissal without attracting legal consequences.

22.On its part, the Respondent submitted that it adduced evidence before the trial court demonstrating that the Appellant absconded duty after being reassigned to perform gate duties. In the same vein, the Respondent argued that the terms of employment permitted the supervisor to allocate the Appellant other duties, and that he opted to abscond instead of complying.

23.The Respondent further posited that the Appellant was accorded a fair disciplinary hearing in the presence of union officials. In support of this position, reliance was placed on the case of *Standard Group Limited v Jenny Luesby (2018) eKLR*.

## **Analysis and Determination**

24. As the first appellate Court, this Court is obligated to re-evaluate the evidence tendered before the trial Court together with the impugned Judgment, and to arrive at its own independent determination as to whether the appeal is merited. In so doing, the Court is entitled to subject the entire record to fresh and exhaustive scrutiny and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This position was affirmed in *Selle & another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123*.

25. Having considered the Record of Appeal, the Appellant's submissions, and the applicable law, the Court has identified the following issues for determination: -

- a) Whether the trial Court erred in failing to find that the Appellant was constructively dismissed upon being reassigned to gate duties;**
- b) Whether the trial Court erred in holding that the Appellant's dismissal was fair and lawful;**
- c) Whether the Appellant is entitled to the reliefs sought before the trial Court.**

### **Constructive dismissal?**

26. The Appellant has taken issue with the learned trial Magistrate for failing to consider that the Respondent's decision to assign him gate duties fell outside the scope of his job description and was tantamount to constructive dismissal.
27. It is notable that the trial Court did not address this issue at all in its judgment.
28. The record bears that the Appellant was engaged by the Respondent as a school bus driver with effect from 9<sup>th</sup> September 2019.
29. It is undisputed that the Respondent's school bus was repossessed on 28<sup>th</sup> February 2023 and that, by a letter dated 20<sup>th</sup> March 2023, the Appellant was reassigned to perform gate duties until further notice.
30. It is evident from the record that this reassignment of duties followed the Appellant's response to the Respondent's Notice to Show Cause dated 12<sup>th</sup> March 2023. In that show cause, the Appellant was accused of desertion of duty following the repossession of the school bus and was required to explain why disciplinary action should not be taken against him.
31. In his response dated 16<sup>th</sup> March 2023, the Appellant stated that he had approached the school principal to seek clarification on his duties, and was

advised to await further direction pending resolution of the matter. He further indicated that he had continued reporting to the school to enquire about the status of the bus, but the principal was unaware of when normal operations would resume.

32. In the same response, the Appellant asserted that the school principal had neither demonstrated any intention to redeploy him to another department nor assigned him duties consistent with his job description. He maintained that, since the school bus, his primary working tool, had been repossessed, this ought not to be attributed to any fault on his part.

33. It is this reassignment of duties that the Appellant contends amounted to constructive dismissal.

34. In its Defence, the Respondent contended that the Appellant's job description permitted his supervisor to assign him other duties.

35. In view of the parties' rival positions, the central issue that arises for determination is whether the reassignment of the Appellant from driving the school bus to manning the school gate amounted to constructive dismissal.

36. The **Black's Law Dictionary (10<sup>th</sup> Edition, p. 561)** defines constructive dismissal as: ***“an employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”***

37. In essence, constructive dismissal arises where an employee is driven to resign, not by choice, but as a result of the employer’s conduct. In such circumstances, the employee is entitled to terminate the employment relationship without notice.

38. In the leading case of ***Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR***, the Court of Appeal set out the guiding principles for determining claims of constructive dismissal as follows: -

- a) *What are the fundamental or essential terms of the contract of employment?*
- b) *Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?*
- c) *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows*

*that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

- d) An objective test is to be applied in evaluating the employer's conduct.*
- e) There must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e causation must be proved.*
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*

39. Applying the foregoing principles to the present case, the Court finds that the Appellant's job description constituted a fundamental term of the contract of employment. The key question, therefore, is whether the Respondent's reassignment of duties amounted to a repudiatory breach of those fundamental terms and, if so, whether such conduct was sufficiently grave as to go to the root of the contract or to demonstrate an intention on the part of the Respondent not to be bound by one or more of its essential terms.

40. It is evident that the reassignment of duties was precipitated by the repossession of the school bus, which was the Appellant's primary tool of work. As it emerges from the Notice to Show Cause and the Appellant's response thereto, there was uncertainty at the time as to when the bus would be returned, and normal operations resumed.

41. It is worth pointing out that the unilateral reallocation of duties by an employer without justification amounts to a fundamental breach of the contract of employment, entitling an employee to treat themselves as constructively dismissed.

42. As stated herein, the Appellant's job description formed a fundamental term of the contract of employment, and any variation thereto was required to comply with the provisions of **Section 10(5) of the Employment Act**, which stipulates as follows:

***[10](5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.***

43. However, in the present case, there is no evidence that the Respondent consulted the Appellant or obtained his prior consent before reassigning him to gate duties, which were fundamentally different from his day-to-day duties as a school bus driver.

44. Further, in as much as the Appellant's contract of service provided that he could be assigned additional duties by his supervisor, such duties were required to bear a reasonable relation to his primary role. In this instance, the task of manning the gate was in no way connected to his core job description of a school bus driver.

45. In light of the foregoing, the Court finds that the Respondent's unilateral reassignment of duties to the Appellant constituted a breach of the contract of employment and amounted to constructive dismissal.

46. I would have stopped there but given that the Appellant was issued with a letter of summary dismissal from employment, it is necessary for the Court to proceed further and determine whether the said dismissal was unfair and unlawful.

### **Unfair and unlawful termination?**

47. The Appellant has further faulted the finding by the trial Court that his dismissal from employment was fair and lawful.

48. The Employment Act proscribes unfair and unlawful termination of employment. In this regard, an employer bears the burden of demonstrating that the termination of an employee was both substantively justified and procedurally fair. The applicable legal framework for assessing whether a termination meets this threshold is set out under **Sections 41, 43, and 45 of the Act.**

49. While substantive justification concerns the validity and fairness of the reasons leading to an employee's termination, procedural fairness pertains to the process followed in effecting the termination. I will begin by addressing the issue of substantive justification.

**(i) Substantive justification**

50. Pursuant to **Section 43(1) of the Act**, an employer is required to prove the reasons for terminating an employee, failing which the termination shall be deemed unfair within the meaning of Section 45 of the Act.

51. Under **Section 45(2)(a) and (b) of the Act**, a termination of employment is unfair where the employer fails to demonstrate that the reason for termination is valid, fair, and related to the employee's conduct, capacity, or compatibility, or based on the employer's operational requirements.

52. In the present case, the Appellant was dismissed on grounds of absconding duty and insubordination towards the appointing authority. However, the letter of summary dismissal did not specify the particular dates on which the Appellant allegedly absconded duty nor did it particularise the alleged acts of insubordination.

53. It is evident from the record that the decision to summarily dismiss the Appellant was made following a meeting of the Respondent Board held on 14<sup>th</sup> April 2023. The minutes of that meeting indicate that the Appellant was alleged to have absconded duty on 24<sup>th</sup> March 2023 and 12<sup>th</sup> April 2023.

54. Pursuant to **Sections 43(1) and 45(2)(a) and (b) of the Act**, the Respondent, as the employer, bore the evidential burden of proving that the reasons for termination of the Appellant's employment were valid and fair. This required it to demonstrate by way of evidence the factual basis upon which the allegations were founded.

55. Notably, the Respondent did not adduce any documentary or other credible evidence, such as work attendance records, to substantiate its claim that the Appellant absconded duty on 24<sup>th</sup> March 2023, 12<sup>th</sup> April 2023, or on any other occasion following his redeployment. I say so, noting that the minutes referred to an attendance register, which was not produced as evidence before the trial Court. Why wasn't the same exhibited at the trial Court?

56. In light of the foregoing, the Respondent failed to discharge its evidential burden under **Sections 43(1) and 45(2)(a) and (b) of the Employment Act**, and accordingly, the Appellant's termination was substantively unfair.

**(ii) Procedural fairness?**

57. Turning to procedural fairness, an employer is required under **Section 45(2)(c) of the Employment Act** to demonstrate that the termination of employment was effected in accordance with fair procedure. **Section 41 of the Act** prescribes the elements of fair procedure, which include notifying the employee of the allegations against him or her and affording an opportunity to respond to the same in the presence of a fellow employee or union representative of choice.

58. In the present case, the Respondent contended before the trial Court that the Appellant was aware of the allegations against him, attended the disciplinary hearing, and elected not to defend himself.

59. The record bears that the Appellant was issued with a Notice to Show Cause on allegations that he failed to report to his work station following the repossession of the school bus. After the Appellant's response to the Notice to Show Cause, he was assigned gate duties on 20<sup>th</sup> March 2023.

60. It further emerges from the record that the Appellant was subsequently invited to a disciplinary hearing scheduled for 6<sup>th</sup> April 2023. However, the Respondent did not specify the precise acts of gross misconduct that formed the subject of the hearing.

61. This is particularly significant given that the Appellant had responded to the earlier Notice to Show Cause and the Respondent had reacted by reassigning the Appellant gate duties. It was therefore necessary to clarify whether the disciplinary process related to the same allegations or to new complaints that had since arisen after the reassignment of duties.

62.Indeed, the Appellant wrote to the Respondent vide a letter dated 30<sup>th</sup> March 2023 requesting particulars of the allegations to enable him adequately prepare his defence.

63.The record bears that the Respondent only responded to the Appellant's request on 6<sup>th</sup> April 2023, detailing the allegations of gross misconduct. Notably, this was the very same date scheduled for the disciplinary hearing. In the circumstances, it is doubtful that the Appellant was afforded sufficient time to consider and respond meaningfully to the allegations at the disciplinary hearing.

64.At the trial Court, the Respondent produced minutes of the disciplinary meeting held on 6<sup>th</sup> April 2023. However, it is not clear from the said minutes whether the Appellant was afforded a proper opportunity to present his defence to the allegations made against him.

65.It is also apparent that following the said disciplinary process, the Appellant was reassigned to gate duties on 11<sup>th</sup> April 2023.

66.The record further indicates that another Board meeting of the Respondent was convened on 14<sup>th</sup> April 2023, which culminated in the decision to terminate the Appellant's employment. There is no evidence on record to demonstrate that

the Appellant was notified of this meeting or afforded an opportunity to attend and defend himself. Indeed, the Appellant's presence at the said meeting is not reflected in the minutes thereof. In the circumstances, it is not clear whether the Appellant was heard prior to the decision to terminate his employment.

67. In the final analysis, I am persuaded that, prior to the Respondent's decision to dismiss the Appellant from employment, it failed to comply with the procedural safeguards prescribed under **Section 41 of the Employment Act**. Accordingly, the dismissal from employment was procedurally unfair hence unlawful.

68. The total sum of my consideration is that the learned trial Magistrate erred in finding that the Appellant's dismissal from employment was fair and lawful.

### **Reliefs?**

69. Having found that the Appellant's termination from employment was unfair and unlawful, the Court awards him one (1) month's salary in lieu of notice together with compensation equivalent to four (4) months' gross salary. In making this award, the Court has taken into account the length of the employment relationship and the circumstances surrounding the termination of employment.

70. The Appellant further claimed the sum of Kshs 350,574.00 being salary underpayment for a period of 48 months.

71. Pursuant to Legal Notice No. 2 of 2018, the minimum consolidated wage for an employee in the Appellant's category (driver) working in Igoji for the period 1<sup>st</sup> May 2018 to 30<sup>th</sup> April 2022 was **Kshs 21,713.40** (being Kshs 18,881.21 + 15% house allowance). Given that the Appellant was earning Kshs 12,600.00 per month, it follows that he was underpaid by **Kshs 9,113.40** per month from 9<sup>th</sup> September 2019, being the date of his employment up to 30<sup>th</sup> April 2022, when the minimum wage was increased.

72. For the period 1<sup>st</sup> May 2022 to 25<sup>th</sup> April 2023, when the Appellant's employment was terminated, the applicable statutory minimum wage for workers in his category in Igoji was Kshs 21,147.00 pursuant to Legal Notice No. 125 of 2022. When the 15% house allowance is factored in, the minimum consolidated salary amounted to **Kshs 24,319.05**. Consequently, the Appellant was underpaid by **Kshs 11,719.05** per month during this period.

73. In respect of the claim for annual leave, the Appellant seeks payment for a period of three and a half (3.5) years. The Respondent, as the employer, was under a statutory duty to keep and maintain leave records pursuant to **Section 74(1)(f) of the Act**. Notwithstanding this obligation, it failed to produce the Appellant's leave records to enable the Court ascertain the leave days taken

during the course of employment and any outstanding balance as at the date of termination.

74. Be that as it may, under **Section 28(4) of the Act**, the Appellant is only entitled to claim unpaid annual leave in respect of the 18 months immediately preceding the date of termination.

75. As such, the Court finds that the Appellant is entitled to payment for unpaid leave days limited to the 18 months preceding the date of termination.

76. The claim for two (2) months' salary arrears is disallowed, the Appellant having failed to particularise the period to which the alleged arrears relate.

77. The claim for service pay is similarly declined, it being evident that the Appellant was a registered member of the National Social Security Fund and therefore falls within the exclusions contemplated under **Section 35(6) of the Employment Act**.

### **Orders**

78. In the final analysis, the Appeal is allowed in the following manner: -

- a) The trial Court's order dismissing the Appellant's suit is hereby set aside.**

- b) The Appellant is awarded the sum of Kshs 24,319.05 being one month's salary in lieu of notice.**
- c) The Appellant is awarded compensation for unfair termination in the sum of Kshs 97,276.20 being equivalent to four (4) months of his salary.**
- d) The Appellant is awarded salary underpayments in the sum of Kshs 291,628.80 from 9<sup>th</sup> September 2019 up to 30<sup>th</sup> April 2022; (Kshs 9,113.40 x 32 months).**
- e) The Appellant is awarded salary underpayments in the sum of Kshs 140,628.60 from 1<sup>st</sup> May 2022 up to 25<sup>th</sup> April 2023; (Kshs 11,719.05 x 12 months).**
- f) The Appellant is awarded unpaid leave for 18 months being in the sum of Kshs 25,535.00.**
- g) The total award is Kshs 579,387.65**
- h) Interest on the amount in (g) at court rates from the date of this Judgment until payment in full.**

79. As the Appeal has succeeded, costs in this Court and at the trial Court shall be borne by the Respondent.

**DATED, SIGNED and DELIVERED at NYERI this 17<sup>th</sup> day of April 2026.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Appellant

Mr. Miriti

For the Respondent

Mr. Mugambi

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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