



Naiberi River Campsite and Resort v Jomo (Employment and Labour Relations Appeal E012 of 2022) [2026] KEELRC 978 (KLR) (16 April 2026) (Judgment)

Neutral citation: [2026] KEELRC 978 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2022**

MA ONYANGO, J

APRIL 16, 2026

BETWEEN

NAIBERI RIVER CAMPSITE AND RESORT APPELLANT

AND

ANDREW INJENDI JOMO RESPONDENT

(Being an appeal from the judgment of Honourable S. Wewa (Senior Principle Magistrate) in Eldoret CMELRC Cause No. 147 of 2019 delivered on 16th September 2021)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 147 of 2019 wherein the Respondent sued the Appellant vide a Statement of Claim dated 5th November 2018 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 16th September 2021 in favour of the Respondent awarding him the prayers as sought in his Statement of Claim.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 24th March 2022 on the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact in finding that the Respondent's employment was terminated unlawfully and without following laid procedures.
 - b. The learned trial magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probability contrary to the evidence on record.
 - c. The learned trial magistrate erred in law and fact in failing to find that the Respondent resigned voluntarily from his employment.



- d. The learned trial magistrate erred in law and fact in failing to find that the Respondent was paid all his dues receipt whereof we acknowledge.
 - e. The learned trial magistrate erred in law and fact by awarding the Respondent termination dues without laying a basis for the same.
 - f. The learned trial magistrate erred in law and fact in failing to consider the Appellant's evidence on record and submissions.
4. The Appellant prays for the following orders:
 - a. The judgment of the lower court be set aside
 - b. An order be made dismissing the Respondent's cause
 - c. Costs of this appeal and the lower court be awarded to the Appellant
 5. The appeal was disposed of by way of written submissions, with both parties filing their respective submissions dated 5th December 2025.

Analysis

6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
7. Vide his Statement of Claim dated 5th November 2018, the Claimant (now the Respondent) sued the Appellant seeking for compensation for unfair termination and payment of his terminal dues.
8. The Claimant averred that he was employed by the Appellant on 6th January 2018 and that at the time he was unfairly terminated from employment, he was earning a monthly salary of Kshs. 29,000.
9. The Claimant averred that he served the Respondent with loyalty, diligence and with full dedication until 26th June 2018 when the Respondent wrongfully, unprocedurally and unlawfully terminated his services without a valid reason and blatantly refused to pay his terminal benefits.
10. It was the Claimant's case that the Appellant terminated his services when he extended his off days by a day but he had actually sought permission from the supervisor.
11. According to the Claimant, the termination of his employment was unfair as the Respondent did not act within the provisions of section 41 and 45 of the *Employment Act*.
12. The Claimant contended that owing to the alleged unfair termination of his employment, he was entitled to terminal benefits which he tabulated as hereunder: -
 - i. One month pay in lieu of notice.....Kshs 33,350
 - ii. 12 months compensation for unfair termination..... Kshs 400,200
 - iii. Leave dues..... Kshs 65,438.33
 - iv. Pro rate leave for 2017..... Kshs 12,180
 - v. Service pay/Gratuity..... Kshs 58,000
 Total..... Kshs. 567,138.33



13. The Claimant thus prayed for the following reliefs:
 - a. A Declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation of her terminal dues as outlined above
 - b. Reinstatement with full salary, benefits and continuity of service without victimization
 - c. In the alternative, the sum of Kshs 567,138.33 in terminal benefits as set out above
 - d. Exemplary damages
 - e. Certificate of service
 - f. Cost of this suit and interests at court rates from time of filing the suit until payment in full
 - g. Any other awards as the honourable court deems fit to grant in the circumstances of this case.
14. The Appellant (Respondent in the trial court) filed a Defence dated 25th June 2019 denying that the averments made by the Respondent in his Claim. The Appellant maintained that the Respondent voluntarily resigned from employment on 26th June 2018.
15. The Appellant prayed that the suit be dismissed with costs.
16. From the record of appeal, the proceedings of the trial court are missing. The record shows that despite numerous attempts to trace the lower court file, including the issuance of summons to the Court Administrator and directions to the Chief Magistrate (CM) and Deputy Registrar (DR), the file could not be availed to this Court.
17. On 21st October 2025, the parties consented to have the appeal proceed under Rule 59 on the basis of the existing record of appeal.

The Appellant's submissions

18. In its submissions dated 5th December 2025, the Appellant crystallized the grounds of appeal into the following two issues:
 - i. Whether the Respondent was unlawfully and/or unfairly terminated from employment?
 - ii. Whether the learned trial magistrate erred in law and fact in failing to find that the Respondent was paid all dues receipt whereof he acknowledged.
19. On the first issue, the Appellant submitted that the Respondent, in his Statement of Claim, alleged that his employment was wrongfully, unprocedurally, and unlawfully terminated on 26th June 2018. However, in his oral testimony before the trial court, he stated that he had proceeded on leave but failed to resume duty on the due date.
20. The Appellant maintained that upon the Respondent's failure to resume duty, it issued him with a notice to show cause requiring him to explain why he had failed to report back to work without notifying the relevant supervisor. The Appellant submitted that although the Respondent alleged that he had communicated and obtained permission to extend his leave, no documentary proof of such communication was produced before the trial court.
21. The Appellant submitted that on its part, it produced at trial, a copy of the notice to show cause dated 25th June 2018, which was issued to the Respondent. That in disregard of the disciplinary hearing process, the Respondent proceeded to write a resignation letter dated 26th June 2018.



22. While relying on Section 47(5) of the *Employment Act*, the Appellant submitted that the Respondent was at no point terminated from employment, but rather voluntarily resigned as evidenced by the resignation letter dated 26th June 2018.
23. The Appellant further submitted that although the Respondent did not disclose the resignation in his pleadings, he admitted during cross-examination that he authored and delivered the resignation letter to the Appellant's Human Resource Manager and the Accountant. The Appellant contended that this admission confirms that the resignation by the Respondent was voluntary.
24. It was submitted that despite alleging unfair termination, the Respondent failed to produce any evidence to demonstrate that his employment was terminated at the instance of the Appellant. In this regard, the Appellant argued that if the Respondent was alleging that his resignation was involuntary, then the burden lay upon him to prove constructive dismissal. It was submitted that the applicable test requires proof that the employer's conduct made the working environment intolerable, that the resignation was a response to such conduct and that the resignation was made without undue delay. In support of this position, the Appellant relied on the case *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* [2015] eKLR.
25. The Appellant submitted that the Respondent neither pleaded nor proved any of the elements of constructive dismissal and did not demonstrate that the Appellant's conduct forced him to resign.
26. Further, the Appellant submitted that the Respondent's resignation after being issued with a show cause letter effectively brought the disciplinary process to an end. In support of this position, reliance was placed on the decision in *Herbert Wafula Waswa v Kenya Wildlife Service* [2020] eKLR.
27. On the second issue, the Appellant submitted that having established that the Respondent was not unfairly terminated, he is not entitled to the remedies he sought in his Statement of Claim. The Appellant maintained that any dues payable were duly calculated and settled as evidenced by the final dues voucher dated 26th June 2018.
28. The Appellant thus urged the court to set aside the entire judgment of the trial court and allow the appeal with costs.

The Respondent's submissions

29. On his part, the Respondent set out the issues for determination in his submissions to be:
 - i. Whether the Respondent was unlawfully, unprocedurally and unfairly terminated by the Appellant
 - ii. Whether the Respondent had resigned voluntarily from employment
 - iii. Whether all dues were paid upon the Respondent
 - iv. Who should pay costs of the appeal?
30. On the first issue, the Respondent submitted that his employment was terminated abruptly on allegations that he had extended his off-duty days by one day. He maintained that he had sought and obtained permission from his supervisor to extend his off days due to his wife's illness.
31. The Respondent submitted that the Appellant failed to call the said supervisor to confirm or rebut this testimony, yet the burden lay on the Appellant to disprove his assertions. He further contended that he was never issued with any notice to show cause regarding absenteeism as alleged by the Appellant.



32. It is the Respondent's further submission that the Appellant failed to invite him to any disciplinary hearing or subject him to the procedure contemplated under Section 41 of the *Employment Act*. The Respondent argued that no documentary evidence was produced to show that he was accorded a hearing, including any invitation letters or minutes of a disciplinary meeting.
33. The Respondent submitted that the Appellant is statutorily obligated to accord an employee a hearing before termination, regardless of the nature of the alleged misconduct. In support of this position, reliance was placed on *Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya)* [2019] eKLR.
34. The Respondent submitted that the Appellant failed to demonstrate both procedural fairness and substantive justification in the termination of his employment as required under Sections 41 and 45 of the *Employment Act*, thereby rendering the termination unfair.
35. On substantive justification, the Respondent submitted that the allegation that he absented himself from work was misleading, as he had sought permission from his supervisor. He further stated that the Human Resource Manager and accountant were based in a sister company and that he only came to know the Human Resource Manager at the time of termination.
36. The Respondent submitted that failure by the Appellant to call the supervisor to rebut his evidence meant that his testimony remained unchallenged and should be deemed truthful.
37. On the issue raised by the Appellant that the Respondent resigned on his own volition, the Respondent submitted that he was coerced into resigning after being issued with an ultimatum that he either resign or risk not being paid his terminal dues.
38. He contended that the circumstances surrounding the alleged resignation raise doubt as to its voluntariness and pointed out that while the Appellant alleged that he refused to sign the show cause letter, it claimed that the Respondent wrote a resignation letter and delivered it to the Accountant's office.
39. The Respondent maintained that he had explained his absence through the supervisor and denied ever receiving or refusing to sign a show cause letter. He further alleged that he was coerced into writing the resignation letter by the Human Resource Manager.
40. It was further submitted that it would be unreasonable for an employee to extend his off days, report back to work and then immediately resign on the same day. The Respondent argued that had he intended to resign voluntarily, he would have followed a proper resignation process, including notice and clearance.
41. On the issue of payment of dues, the Respondent submitted that the Appellant failed to produce any credible evidence to prove that payment was made. He argued that the vouchers produced were not signed by him and no witness testified to confirm that payment was effected.
42. The Respondent submitted that the Appellant's assertion that dues were paid is unsupported and does not meet the legal threshold of proof. He therefore urged the Court to find that he was unfairly terminated and to dismiss the appeal with costs.

Determination

43. I have considered the Appellant's Record of Appeal and the submissions by both parties. The grounds of appeal may be summarized into the following issues for determination:



- i. Whether the Respondent was unlawfully and unfairly terminated from employment or whether he voluntarily resigned
- ii. Whether the trial court erred in awarding the remedies as were awarded to the Respondent,
- iii. What orders should issue.

Whether the Respondent was unlawfully and unfairly terminated from employment or whether he voluntarily resigned

44. As already mentioned, the proceedings of the trial court are missing from the record. The absence of the proceedings inevitably limits this Court's ability to re-evaluate the oral evidence tendered before the trial court. However, the Court is still under a duty to determine whether, on the material available, the findings of the trial court can be sustained.
45. The Appellant's case is that the Respondent absented himself from duty after proceeding on leave, failed to report back on the due date and as a result, was issued with a notice to show cause. It is further averred that the Respondent opted to resign from employment vide a letter dated 26th June 2018.
46. On the other hand, the Respondent maintains that he had obtained permission from his supervisor to extend his off days and that upon resuming duty, he was coerced into resigning under threat of non-payment of his dues.
47. From the record, there is a resignation letter dated 26th June 2018 which the Respondent admitted that he authored. The central question is whether the said resignation was voluntary or was a result of coercion, thereby amounting to constructive dismissal.
48. The law on constructive dismissal is well settled. An employee who alleges that his resignation was not voluntary bears the burden of demonstrating that the employer's conduct created an intolerable working environment leaving him with no reasonable option but to resign.
49. In the instant case, the Respondent alleged that he was coerced into resigning as he was threatened with non-payment of his dues if he failed to resign. However, beyond this assertion, there is no evidence on record demonstrating the circumstances under which the resignation letter was written.
50. On the other hand, the Appellant produced a notice to show cause dated 25th June 2018 and the resignation letter dated 26th June 2018. While the Respondent disputes receiving or signing the show cause letter, he does not deny writing the resignation letter.
51. The fact that the Respondent did not plead constructive dismissal in his Statement of Claim or disclose the fact that he resigned from employment upon coercion by the Respondent is also a material factor.
52. In the absence of evidence demonstrating coercion, and in light of the Respondent's admission that he authored the resignation letter, this Court is inclined to find that the resignation was voluntary.
53. Consequently, the finding by the trial court that the Respondent was unfairly terminated is not supported by the material on record.

Whether the trial court erred in awarding the remedies as were awarded to the Respondent

54. The Appellant submitted that it computed and paid all dues owing to the Respondent as evidenced by a final dues voucher dated 26th June 2018.
55. The Respondent, however, challenged this assertion, contending that the vouchers produced were not signed by him and that no evidence was adduced to demonstrate that payment was actually made.



56. In claims relating to payment of terminal dues, the burden rests upon the employer to demonstrate that payment was made. This is ordinarily done through production of duly acknowledged payment vouchers, bank records or other documentary proof of payment. This is especially important where the employee denies receiving payment.
57. While the Appellant herein alluded to a final dues voucher, there is no indication from the record that the same was acknowledged by the Respondent or that actual payment was effected.
58. In the absence of proof of payment, this Court finds that the Appellant did not discharge its burden in this regard.
59. In its judgment, the trial court awarded the Claimant one month pay in lieu of notice, 12 months compensation for unfair termination, leave dues, prorated leave for 2017 and service pay as sought by the Claimant in his Statement of Claim. I will address the said reliefs in separate heads as hereunder: -

i. One month pay in lieu of notice

The award of one month's salary in lieu of notice is premised on a finding that the Respondent's employment was terminated without notice. However, having found that the Respondent voluntarily resigned from employment and there being no evidence on record to demonstrate that the Respondent issued the requisite notice, the award by the trial court under this head cannot be sustained. Accordingly, the award of one month's salary in lieu of notice is hereby set aside.

ii. 12 months compensation for unfair termination

In view of the finding by this Court that the Respondent voluntarily resigned and that constructive dismissal was not proved, the award of compensation for unfair termination cannot stand. Compensation under Section 49(1)(c) of the *Employment Act* is only available where an employee establishes that termination was unfair within the meaning of Sections 41, 43 and 45 of the Act. Consequently, the award of twelve (12) months' salary as compensation for unfair termination is hereby set aside.

iii. Leave dues

The trial court awarded the Respondent leave dues as claimed in the Statement of Claim. It is trite that a claim for accrued leave is a statutory entitlement under Section 28 of the *Employment Act* and is payable where an employee demonstrates that leave was earned but not taken or paid for. The burden rests upon the employer to keep and produce records of leave taken by an employee. Where such records are not produced, the Court is entitled to draw an adverse inference against the employer. In this case, the Appellant produced records of encashment of leave at page 41 of the Record of Appeal for the years 2014/2015, 2016/2017 and a third one dated 11th March, 2016 which does not indicate the leave year it relates to. The amounts in the said vouchers are Kshs. 20,000, Kshs. 28,000 and Kshs. 25,000 respectively. I am satisfied that the Respondent was paid in lieu of leave. I accordingly set aside the award of the trial court on this head.

iv. Pro rate leave for 2017

The Final Dues Form at page 31 of the Record of Appeal indicates that the Respondent was to be paid 2 months pro rata leave at the time of termination of employment tabulated at Kshs. 3,903. As already stated elsewhere in this judgment, the Appellant did not prove that the Respondent had been paid the amounts tabulated in the Final Dues Form. The pro rata leave



having been included in the said tabulation, the prayer has already been taken care of together with the rest of the final dues.

vi. Service pay

The trial court awarded the Respondent service pay as claimed in the Statement of Claim. Service pay is provided for under Section 35(5) of the *Employment Act* but is expressly excluded under Section 35(6) where an employee is a member of the National Social Security Fund (NSSF) or any other statutory pension scheme to which the employer makes contributions. A perusal of the record of appeal at page 16 shows a NSSF statement which confirms that the Respondent was a contributing member of the NSSF. In view of this evidence, the Respondent falls within the category of employees excluded from entitlement to service pay under Section 35(6) of the *Employment Act*. Consequently, the award of service pay by the trial court was made in error as it was not supported by the law and is hereby set aside.

Conclusion

60. In the upshot, the appeal partially succeeds. Accordingly, the Court makes the following orders:
 - i. The finding of the trial court that the Respondent was unfairly terminated is hereby set aside
 - ii. The award of twelve (12) months' compensation for unfair termination is hereby set aside
 - iii. The award of one month's salary in lieu of notice is hereby set aside
 - iv. The award of pro-rata leave for 2017 is set aside save for the sum indicated in the Final Dues Form.
 - v. The award of leave dues is hereby set aside save for the amount indicated in the Final Dues Form.
 - vi. The award of service pay/gratuity is hereby set aside
61. For Clarity, all the items in the Final Dues Form at page 31 of the Record of Appeal are payable to the Respondent but without the deduction of Kshs. 19,000.00 as stated in the same as no evidence was adduced or a counter claim made in respect of the deduction. All other awards of the Trial Court are set aside.
62. The Appellant to issue certificate of service to the Respondent.
63. As the appeal has partially succeeded, each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 16TH DAY OF APRIL, 2026

MAUREEN ONYANGO

JUDGE

