



**Roche Transport & Logistics Limited v Toroitich (Appeal
E245 of 2024) [2026] KEELRC 1149 (KLR) (23 April 2026) (Judgment)**

Neutral citation: [2026] KEELRC 1149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E245 OF 2024
K OCHARO, J
APRIL 23, 2026**

**BETWEEN
ROCHE TRANSPORT & LOGISTICS LIMITED APPELLANT
AND
MARK TOROITICH RESPONDENT**

*(Being an appeal against the judgment of Hon. Noelyne Reuben (SRM),
delivered on 7th November 2024, in Mombasa CMELRC/E247/2020)*

JUDGMENT

Background

1. Asserting that at all material times he was an employee of the Appellant, whose employment was terminated unfairly and unlawfully, the Respondent sued the Appellant in the above-mentioned suit, seeking the reliefs hereunder against the Appellant;
 - a. A declaration that the termination of the Claimant's employment by the Respondent was wrongful, unlawful, illegal, unprocedural, unfair and/or irregular.
 - b. Under-payment Kshs. 125,328.00
 - c. Maximum compensation for wrongful dismissal and unfair termination of the employment contract, as per sections 49 and 50 of the *Employment Act*, at the rate of the claimant's annual salary, Kshs. 422,664.00
 - d. Notice pay Kshs. 35,222.00
 - e. Service pay Kshs. 35,222.00
 - f. Unpaid leave Kshs. 49,310.52



- g. Public holidays pay Kshs. 51, 658.64
 - h. Overtime Kshs. 1,035,520.92
 - i. House allowance Kshs. 507,196.8
 - j. Certificate of service.
 - k. Costs of the cause.
 - l. Interest from the date of filing this Cause until payment is full.
2. The Respondent opposed the Claimant's claim in its Amended Response to the Memorandum of Claim dated 4th April 2023. It stated that the Claimant was not its employee but was instead employed by Ultra Eureka Farm Ltd, a separate entity subcontracted to provide transport services, and therefore argued that it was wrongly sued. The Respondent further contended that the Claimant was not terminated but absconded from duty after a 14-day suspension following an incident in which he allegedly drove under the influence of alcohol, caused a road traffic accident, and was subsequently arrested, charged, and fined.

Respondent's case in the lower court

3. It was the Respondent's case that he was employed by the Appellant as a heavy commercial truck driver from 10th June 2018 to 24th June 2020, earning a monthly salary of Kshs. 30,000.00. He diligently discharged his duties without any disciplinary issues until 24th June 2020, when he was verbally terminated at the workplace and ordered to leave without any notice or termination letter.
4. The Respondent argued that he was neither given a disciplinary hearing nor informed of any charges, and he was denied the chance to defend himself, contrary to the requirements of the law.
5. He further alleged that during his employment, he was subjected to a violation of his statutory rights and guarantees, including underpayment, non-remittance of NHIF and NSSF contributions, lack of rest days, unpaid leave and public holidays, excessive overtime without compensation, and failure to be provided with house allowance or accommodation.
6. He vehemently contended that the termination of his employment was unfair both substantively and procedurally.

Appellant's case in the lower court

7. The Appellant, through its witness Felix Kipruto, contended that the Respondent was not its employee but was instead employed by Ultra Eureka Farm Ltd, a separate legal entity subcontracted to provide transport services. Accordingly, the Appellant was wrongly sued.
8. It was asserted that the Respondent had a history of misconduct, including drunkenness during working hours, absenteeism, and failure to perform duties. It was specifically alleged that on 8th June 2020, the Respondent, while driving a company truck, was involved in a road traffic accident due to reckless driving and being under the influence of alcohol. He was arrested, charged in court, and fined after pleading guilty.
9. Following the incident, the Respondent was suspended for 14 days. At the end of the suspension period, he failed to report back to work. He thus deserted his duty. The Appellant asserted that the employment was therefore not terminated. By his actions, the Respondent deprived himself of the opportunity to be taken through the disciplinary process where he could be heard.



10. The Appellant firmly held that the Respondent was not entitled to a house allowance as he, at all material times, was under a consolidated salary, statutory deductions (NHIF/NSSF) were dutifully remitted, leave and rest days were granted or compensated, and no overtime or additional allowances were due.
11. Additionally, the Appellant contended that as a result of the Respondent's misconduct, Ultra Eureka Farm Ltd suffered damages, KShs. 63, 082.46 on account of replacing damaged tyres, repair of the police barricade, and repair of the 3rd Party's motor vehicle that was hit by the truck he was driving. They sought the amounts from the Respondent by way of a counterclaim.

Judgment of the lower court

12. After hearing the parties on their respective cases and considering their respective evidence and submissions, the learned trial Magistrate found for the Respondent, holding that he had proved his case for unfair termination and granting him all the reliefs sought in the memorandum of claim.

The Appeal

13. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting out the following grounds:
 - 1) The learned trial magistrate erred, in law and in fact, in holding that the Respondent had been dismissed from employment for gross misconduct, yet there was sufficient evidence that the Respondent absconded from duty after his suspension following the incident of driving while drunk.
 - 2) The learned trial magistrate erred in law and in fact in holding that there was no evidence that the Respondent was drunk while driving, yet the Respondent admitted that he was involved in an accident, charged with the offence of drunk driving, pleaded guilty and was fined Kshs 15,000/-.
 - 3) The learned trial magistrate erred in law and in fact by granting the Respondent all the prayers sought in the claim without proffering any legal or factual analysis for that determination.
 - 4) The learned trial magistrate erred in law and in fact in awarding the Respondent compensation equivalent to twelve (12) months' salary, yet the Respondent:
 - a) Had not been dismissed from employment but rather absconded from duty.
 - b) Contributed to the termination of his employment, and
 - c) Had worked for the Appellant for a period of two (2) years only, and
 - d) Secured another employment four (4) months after disengaging from the Appellant.
 - 5) The learned trial magistrate erred in law and in fact in awarding the Respondent compensation on account of underpayment, yet the Respondent's monthly salary was above the prescribed minimum wage.
 - 6) The learned trial magistrate erred in law and in fact in awarding the Respondent service pay, yet the Respondent produced in court a statement from NSSF showing that he was a member of NSSF



- 7). The learned trial magistrate erred in fact in assessing the Respondent's payment in lieu of leave at Kshs. 49,310.52, yet having worked for two (2) years, the Respondent was entitled to Kshs. 41,400.80 only.
- 8) The learned trial magistrate erred in law and compensation on account of public holidays and overtime, yet the Respondent did not tender any evidence in support of the said claims.
- 9) The learned trial magistrate erred in law and in fact in awarding the Respondent house allowance, yet the Respondent had been offered and accepted without any reservations a consolidated salary
- 10) The learned trial magistrate erred in law and in fact in declining the Appellant's counterclaim, yet the Respondent's defence to the same was a mere denial.
- 11) Save for the payment in lieu of leave and the certificate of service, the Respondent failed to prove his claims to the required standard.

Appellant's submissions

14. The Appellant submits that the trial court erred in finding that the Respondent was its employee and in disregarding evidence demonstrating that the employment relationship existed between the Respondent and Ultra Eureka. It argues that in line with the provisions of sections 107, 108 and 109 of the *Evidence Act*, the onus of proving that he was an employee of the Appellant lay on him. To support this submission, he placed reliance on the case of Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] KECA 423 (KLR). If indeed he was an employee of the Appellant, nothing would have been easier for him than tendering documentary evidence such as a contract or payslips linking him to the Appellant. He failed to discharge the burden of proof. The Court held, in law, that it ignored this fundamental issue.
15. Regarding termination, the Appellant maintains that there was no dismissal but rather a lawful suspension following an incident of gross misconduct involving drunk driving, a traffic accident, and subsequent criminal proceedings in which the Respondent pleaded guilty and was fined. It is argued that the Respondent thereafter absconded from duty and failed to return to work, thereby abandoning his employment.
16. The Appellant faults the trial court, contending that it ignored the evidence and clearly demonstrated that the Respondent deserted duty.
17. The Appellant further submits that the remedies awarded were unjustified and excessive. It argues that compensation for unfair termination was erroneous because no termination occurred, and that the Respondent failed to meet the threshold under section 47(5) of the *Employment Act*. It relies on Aristide Marege Nyang'au v Lavington Security Limited [2021] eKLR to emphasise that compensation under section 49 of the *Employment Act* is available only where unfair termination is established.
18. The Appellant further contends that awarding the maximum twelve months' salary was unwarranted and contrary to the principles set out in OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR. The trial court failed to consider relevant statutory factors when making the award.
19. On the claim for compensation for unpaid house allowance, the Appellant submits that it was demonstrated that at all material times the Respondent earned a consolidated salary. Consolidated salary implied that it included the allowance. To buttress this point, reliance has been placed on Charity Wambui Muriuki v Total Security Surveillance Limited [2017] KEELRC 898 (KLR).



20. It further argues that claims for leave, public holidays and overtime were unsupported by evidence, and ought not have been awarded.
21. With regard to service pay, the Appellant submits that the Respondent was a contributing member of NSSF and therefore not entitled to service pay under section 35(6) of the *Employment Act*. It cites *Julius Mwangi v Meridian Hotel Limited* [2021] eKLR to support this point.
22. Finally, the Appellant contends that the trial court erred in dismissing its counterclaim despite uncontroverted evidence of loss arising from the Respondent's misconduct. It argues that the Respondent's defence was a mere denial and insufficient in law.

Respondent's submissions

23. The Respondent opposes the appeal and supports the trial court's judgment, contending that the appeal is defective and unmeritorious. It is submitted that the Appellant failed to include a certified decree in the record of appeal and effectively admitted part of the unpaid-leave claim.
24. The Respondent maintains that he was lawfully employed by the Appellant and that the employment relationship was terminated on 24th June 2020. He argues that the Appellant's attempt to introduce Ultra Eureka as the employer is an afterthought, unsupported by evidence, particularly given documents such as the suspension letter and the recommendation letter issued directly by the Appellant.
25. On the nature of the appeal, the Respondent submits that this Court, as a first appellate court, is obligated to re-evaluate the evidence and reach its own conclusions, relying on *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, *Selle and Another v Associated Motor Boat Company Limited and Others* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EAL, and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
26. The Respondent contends that his termination was irregular, unprocedural and unlawful, as he was neither issued with notice, nor subjected to a disciplinary process, nor accorded a hearing. He submits that the Appellant failed to produce employment records to rebut his claims.
27. On the allegation of abscondment, the Respondent submits that the law requires an employer asserting that the employee absconded from duty, hence the termination of his employment, to demonstrate efforts they made to trace the employee, inquire why he was out of duty without authority, and, where necessary, notify him of the intention to take disciplinary action against the employee. To fortify the submissions, reliance is placed on *Mariita v Leading Locks & Access System (Cause 2407 of 2017)* [2022] KEELRC 1194 (KLR). The Appellant failed to prove what the law required. Their assertion that he absconded from duty would not be successful in the circumstances.
28. It is further argued that there can be no contestation that the termination was effected without a hearing. It was therefore procedurally unfair.
29. Further, the Appellant failed to place before the lower court evidence of demonstrating that they had a valid reason for termination. They were under a legal duty to prove this. In light of the failure, the termination was unfair.
30. Regarding the remedies awarded, the Respondent maintains that the trial court properly exercised its discretion and that there is no basis for appellate intervention.



31. Finally, the Respondent submits that costs were properly awarded as they should follow the event. To buttress this point, *Osapil v Kaddu* (2001) EA 193 and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, have been cited.

Analysis and Determination.

32. I have carefully considered the record, the grounds of appeal and the respective submissions by Counsel for the Parties. In my view, this appeal revolves around three principal issues;
- a. Whether at all material times the Respondent was an employee of the Appellant.
 - b. Was the Respondent's employment unfairly terminated at the initiative of the Appellant?
 - c. Was the Appellant entitled to the reliefs sought?
33. The Appellant contended that at all material times, the Respondent was not its employee but that of Ultra Eureka Farm Limited, a 3rd party with whom they had a sub-contract agreement for transportation of cement for Hima Cement Limited. As such, the Respondent had no cause of action against them. If indeed he had any, then it would be against Ultra Eureka Farm. The Respondent wrongfully sued them.
34. The suspension letter dated 10th June 2020 was unequivocally issued by the Appellant to the Respondent; it did not emanate from Ultra Eureka Farm Ltd. This is a critical distinction. Further, the Appellant's own recommendation letter dated 24th June 2020 expressly identifies the Respondent as its employee. That admission is both clear and deliberate.
35. Taken together, these documents leave no room for ambiguity: at all material times, the Respondent was in the employment of the appellant, not Ultra Eureka Farm Ltd. The Appellant cannot now seek to disassociate itself from the employment relationship in the face of its own contemporaneous records, which firmly establish its role as the Respondent's employer.
36. Consequently, I agree with the Respondent's submissions that the learned trial Magistrate did not err in finding that the Respondent was, at all relevant times, an employee of the Appellant.
37. The Appellant argued that the Respondent was suspended for a period of fourteen days but did not resume work upon the expiration of this period. Upon careful review of the detailed suspension letter, it is noted that it did not specify when or how the Respondent was to return to work. In my view, the suspension was effectively indefinite. Additionally, there was no subsequent communication instructing the Respondent to return to work following the lapse of the suspension period.
38. By reason of the foregoing, I am unpersuaded that the Appellant proved before the trial magistrate that the Respondent didn't return to work after the suspension period, thereby deserting duty.
39. Assuming I am incorrect in the foregoing, I would still contend that desertion has not been adequately demonstrated. On 24th June 2020, which is fourteen days subsequent to the issuance of the suspension letter, the Respondent received a commendatory letter characterized by a notably positive tone. The Appellant did not dispute the issuance of this letter. An unavoidable conclusion in this context is that, on 24th June 2020, the Respondent was present at the place of employment. In fact, this date corresponds to the fourteenth day of the suspension period.
40. Inarguably, desertion of duty is gross misconduct under Section 44 of the *Employment Act* and, where it genuinely exists as a fact, can constitute a valid reason for summary dismissal of an employee. However, for an employee to successfully rely on desertion of duty as a basis for ending the employment



- relationship, they must demonstrate that desertion occurred and that they followed a procedure that complied with the dictates of procedural fairness to bring the relationship to an end.
41. What emerged in the Appellant's case before the trial Court was that bald assertion that there was desertion, which I have said, there wasn't, without show that after the alleged desertion, the Appellant informed the Respondent, and apparently they had the opportunity to on 24th June 2020, that they intended to take disciplinary action against him on account of desertion, invite him to a disciplinary hearing where he would defend himself against the charge, and thereafter consider his representations. All these in compliance with the provisions of section 41 of the *Employment Act*.
 42. Under section 45 of the *Employment Act*, the termination of an employee's employment is unfair if it is not demonstrated that it was based on a valid and fair ground and that it was procedurally fair.
 43. Having concluded as indicated hereinabove, I am not hesitant to determine that the Appellant did not discharge the burden of proof under sections 43, 45, and 41 of the *Employment Act*. Consequently, the learned trial Magistrate did not err in finding that the Respondent's employment was unlawfully terminated.
 44. It is a settled principle of law that a judicial officer is under a duty to give reasons for every determination made on an issue placed before the court. This obligation is not merely procedural; it is a substantive requirement that underpins the administration of justice. The giving of reasons ensures transparency and accountability in judicial decision-making, demonstrates that the court has duly considered the parties' arguments and the applicable law, and facilitates the right of appeal by enabling an appellate court to understand the basis for the decision. It also promotes public confidence in the judicial process by dispelling any perception of arbitrariness and affirming that justice is not only done, but is manifestly seen to be done.
 45. I agree with the Appellant that the learned trial Magistrate adopted an undesirable approach in the disposal paragraph of her judgment, stating, 'In conclusion, the prayers are granted as indicated on the face of the claim.' She did so without justifying the grant of the reliefs sought, despite some being subject to judicial discretion and others, such as underpayments, being determined by mathematical computation under the relevant Wage Orders.
 46. Having said this, I now turn to consider whether the Respondent was entitled to the reliefs granted in his favour. The Respondent contended that at all material times the Appellant paid him less than the minimum wage stipulated in the relevant Wages Order. I have considered the Respondent's submissions in this appeal regarding the relief awarded to him; they are somewhat casual and general. Before the lower court, he did not tie his contention to any specific Wage Order. In his submissions in the instant appeal, too. For this reason, I hold that he was not entitled to the award. It is hereby set aside.
 47. The Appellant admitted in their submissions that, for the earned but unutilised leave days, the Respondent was entitled to KShs. 41,400.00. What the Respondent pleaded for in the lower court and was awarded was an amount calculated on the basis of the higher figure he asserted he was supposed to have been earning. Having held, as I have hereinabove, that the underpayment was not proved, it is easy to conclude that the amount put forward under this head was erroneous.
 48. I have carefully considered the material placed before the lower court in relation to the Respondent's claim for overtime and unpaid house allowance, and have come to the conclusion that figures were simply thrown at the trial court, figures which were not justified by evidence. Had the learned trial magistrate considered the evidence critically, it would have dawned on her that the entitlement to the reliefs had not been established.



49. This Court has said time and again that an employee is not entitled to compensation for allegedly unpaid public holidays merely by asserting that he worked without compensation. The vital step the employee must take is to set out in detail and explicitly the public holidays worked. I note that each year may not have the same number of public holidays as others. In this matter, it does not appear that the details were brought out in the pleadings and evidence before the lower court. The learned trial Magistrate had no basis to award the relief.
50. The compensatory award contemplated under Section 49[1][c] of the *Employment Act* is awarded by exercise of judicial discretion, dependent on the circumstances of each case. Statutory factors such as an employee's length of service, whether the employee contributed in any way to the termination, and whether the employee secured another job after the dismissal are taken into account in the exercise of that discretion. Apparently, they were not considered by the learned trial Court.
51. I have carefully considered the length of the period during which the Respondent was employed, the uncontested fact that he secured another job elsewhere within four months of the termination of his employment, and conclude that he would fairly be entitled to four months' gross salary.
52. Under Section 35 of the *Employment Act*, the Respondent's employment was terminable by twenty-eight days' notice. On the basis that his monthly salary ought to have been KShs. 35,000, the Respondent sought that amount, and the learned trial Magistrate awarded it. In light of this Court's conclusion hereinabove that there were no underpayments, the amount awarded is hereby reduced to KShs. 30,000.
53. The Appellant has submitted that the learned trial Magistrate erred in law when she dismissed the counterclaim. On careful consideration of the material placed before the trial Magistrate, it is clear that the alleged loss resulting from the Respondent's actions was suffered by Ultra Eureka Farm Limited. Accordingly, the Appellant lacked locus standi to bring the counterclaim against the Respondent. The counterclaim was rightly dismissed.
54. In the upshot, the instant appeal succeeds partially, thus;
- a. The learned trial Magistrate's finding that the appellant is granted all the prayers on the face of the Statement of Claim is hereby set aside. Consequently;
 - I. The compensatory award pursuant to the provisions of Section 49[1][c] of the *Employment Act* is hereby reduced to four months' gross salary.
 - II. The award under the head "underpayments" is set aside.
 - III. The award for notice pay is reduced from KShs. 35,000 to KShs. 30,000.
 - IV. The award for service pay is set aside. The Respondent was a member of NSSF.
 - V. The award for public holidays worked but was not compensated for, is hereby set aside.
 - VI. The award under the head of unpaid leave days is reduced to KShs. 41, 4000.00.
 - VII. The awards under the heads overtime and unpaid house allowance are hereby set aside.
 - b. Each party to bear its own costs.

READ SIGNED AND DELIVERED THIS 23RD DAY OF APRIL 2026.

OCHARO KEBIRA

JUDGE

