

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. E126 OF 2024

(Before D. K. N. Marete)

THREE DEE ENTERPRISES LIMITED.....APPELLANT

VERSUS

AGGREY KIGAME MUHINDI.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 20th November 2024. It is an appeal from a judgment delivered on 5th March 2024 in Milimani MCELRC E135 of 2021.

The Memorandum of Appeal sets out the following as grounds:

- 1. The Learned Magistrate erred in law and in fact by considering testimony from persons that are strangers to the parties and the proceedings.*
- 2. The Learned Magistrate erred in law and in fact by failing to consider the testimony and evidence adduced by the actual parties to the proceedings.*
- 3. The Learned Magistrate erred in law and in fact by shifting the burden of proof to the Respondent who did not plead to having summarily dismissed the Claimant for desertion but merely mounted a defence that the Claimant had absented himself from work which was common practice in the industry every end of the year.*

4. *The Learned Magistrate erred in law and fact by failing to consider the uncontroverted fact that the person accused of summarily dismissing the Claimant was not at the establishment on the material date that he is alleged to have summarily dismissed the Claimant.*
5. *The Learned Magistrate erred in law and fact by holding that the Claimant had succeeded in his claims for unfair, wrongful, unprocedural and unlawful termination of employment in the absence of evidence and corroborating testimony.*

The Appellant prays for orders that:

- a) *This appeal be allowed.*
- b) *The Judgment of the Subordinate Court dated 5th March 2024 be set aside and replaced with an order dismissing the Statement of Claim dated 26th January 2021.*
- c) *The costs of this appeal and of the proceedings in the Trial Court be borne by the Respondent.*

The Appellant's case before the trial court was that the Respondent's claim of verbal dismissal was false and that he voluntarily absented himself from work. The Appellant's Chief Executive Officer, one, Francis Aremo Odera testified that he ordinarily takes his holiday in late December to early January of every year and that in December, 2020 he was in Mombasa. He further testified that the Claimant had absented himself from work and was not terminated at any instance, and that absenteeism at the end of the calendar year was an ordinary occurrence in the hospitality industry. The Appellant wrote to the Respondent on 18th January, 2021 directing him

to return to work by 22nd January 2021, failure to which disciplinary action including dismissal would follow. The Respondent gave no response to this letter.

The Respondent's case before the trial court was that on 26th December 2020, from 1300 hours to 1700 hours, he was unlawfully confined and detained together with an unnamed colleague in an apartment along Elgeyo Marakwet Road on an allegation of theft from the Chief Executive Officer's motor vehicle while it was being washed. He avers that he was subjected to humiliation, mental anguish and suffering by being compelled to sit on the floor in that apartment for five (5) hours. Upon his release he was directed not to report to work until called back, which he understood to be a termination of his employment. He contended that no notice was given, no investigations were conducted, and no opportunity was afforded to him to be heard.

The Respondent sought the following reliefs before the trial court;

- i) *A declaration that his termination was irregular, unfair, unprocedural and unlawful;*
- ii) *One month's salary in lieu of notice at Kshs.17,000.00*
- iii) *Compensation for unfair and unlawful termination of Kshs.204,000.00*
- iv) *Overtime at 5 hours per day*
- v) *Certificate of service*
- vi) *Damages for inhuman and degrading treatment and unlawful detention*
- vii) *Costs and interest from the date of filing suit.*

The trial court, by a judgment dated 5th March, 2024 found and declared that the Respondent's employment was unfairly, wrongfully, irregularly, unprocedurally and unlawfully terminated. It awarded relief as follows;

- (i) One month's salary in lieu of notice at Kshs.10,500.00
- (ii) Compensation for wrongful termination at Kshs.63,000.00 being 6 months' salary
- (iii) Costs of the suit
- (iv) Interest at court rates from the date of Judgment until payment in full.
- (v) A certificate of service.

Parties filed written submissions before this Court. I have considered these together with the Record of Appeal and the Supplementary Record of Appeal together with the typed and handwritten proceedings of the trial court.

The issues for determination therefore are;

1. Whether the Judgment of the trial court is sustainable.
2. Whether the Appellant is entitled to the reliefs sought.
3. Who bears the costs of this appeal.

On the 1st issue as to whether the Judgment of the trial court is sustainable, the starting point is the standard of review on a first appeal. This Court is entitled to re-evaluate the evidence on the record and draw its own conclusions, while remaining conscious that it lacked the advantage of

observing the demeanour of witnesses at trial. Interference is warranted only where the trial court misdirected itself in law, misapprehended the facts, took irrelevant considerations into account, failed to consider relevant matters, or reached a decision that is plainly wrong. This is the position in the authority of **Selle and Another v Associated Motor Boat Co. Ltd [1968] EA 123**.

It is not in dispute that the trial court's judgment at paragraph 5 lists the witnesses as CW1, Isaac Wabwire Wandera and RW1 as Peter Kimanzi while RW2 is Anastacia Mwenzwa. These names are unknown to both parties and their advocates. The witnesses who actually testified in the matter were the Respondent, Aggrey Kigame Muhindi, and the Appellant's Chief Executive Officer, Francis Aremo Odera. This is confirmed by the handwritten proceedings forming part of the Supplementary Record of Appeal, which record the hearing before the trial court and the witnesses adopting their statements in the cause. Neither party can identify the testimonies that the trial court purports to have considered.

The Respondent seeks to characterise this as a mere blunder and error apparent on the face of the record and seeks to rely on the authority of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)** and **Nyamogo and Nyamogo v Kogo [2001] EA 174**, as cited in **Timafloor Limited v Ndai [2025] KEELRC 1470 (KLR)**. It is correct that not every error invalidates a judgment. However, there is a fundamental distinction between a typographical or clerical error and a systemic failure to evaluate the evidence of the actual parties. The doctrine of error apparent on the face of the record, as defined in **Nyamogo v Kogo** above speaks of a clear error on a substantial point of law staring one in the face of such record.

That is not what has occurred here. A Judgment premised on the *viva voce* evidence of witnesses who never testified in the proceedings is a Judgment that has not engaged with the evidence before the court at all. As the Court of Appeal observed in **Mbogo & Another v Shah [1968] EA 93**, appellate intervention is warranted where a trial court's decision is based on a misapprehension of the evidence. In this case the misapprehension is total, not partial and this vitiates the entire judgment.

The structural defect is further compounded by the internal inconsistency in the figures awarded. The agreed salary of the Respondent was Kshs.17,000.00 per month and this is confirmed by the parties. Yet the trial court awarded salary in lieu of notice at Kshs.10,500.00 which it described as the undisputed gross salary and calculated compensation on the basis of service from 1st May, 2015 to 12th November, 2019 all dates that having no connection to the facts of this case. The Court of Appeal in **Peters v Sunday Post Ltd [1958] EA 424** observed that where there is no evidence to support a particular conclusion, or where the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide or interfere. This court is satisfied that the trial court's judgment plainly went wrong. The judgment of the trial court is therefore not sustainable.

On the merits, the Appellant also succeeds. The CEO testified that he was in Mombasa on holiday in December, 2020 and could not therefore have personally detained and verbally dismissed the Respondent as alleged. Under cross-examination, the CEO admitted that he had no documents to show that he was in Mombasa at the material time and no evidence of approved leave, explaining that in his position he does not apply for leave as there is no one he reports to.

These admissions are noted. Nevertheless, the absence of documentary proof of the CEO's whereabouts does not establish the Respondent's account. The burden remained on the Respondent throughout to prove that termination occurred. In reliance on Sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya and on section 47(5) of the Employment Act, 2007 as affirmed in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR)**, the burden of proving that unfair termination occurred rests on the employee. The Respondent's account rests entirely and exclusively on his own bare testimony. He did not call the unnamed colleague who allegedly shared his detention. There is no police report. There is no documentary evidence of any complaint. In cross-examination the Respondent confirmed that he had the CEO's telephone number and made no effort to contact his employer after 26th December, 2020 and that he left the premises at the time he would ordinarily leave work on any other day. The Appellant's letter of 18th January 2021 calling the Respondent back to work is fundamentally inconsistent with an employer that had already terminated the employment. On a balance of probabilities the Respondent has not proved that his employment was terminated by the Appellant. The claim accordingly fails.

On the 2nd issue, whether the Appellant is entitled to the reliefs sought, it is. Having found that the judgment of the trial court is unsustainable and that the Respondent's claim fails on the merits, the Appellant is entitled to the reliefs sought.

On the 3rd issue, costs follow the event. The Appellant has succeeded in this appeal and is entitled to the costs thereof and of the proceedings in the Trial Court.

I am therefore inclined to allow the appeal and order as follows;

- i) The judgment and decree of the trial court in MCELRC E135 of 2021 dated 5th March, 2024 be and are hereby set aside in its entirety.
- ii) Each party bears their costs of the appeal.

Delivered, dated and signed this **14th** day of **May** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Biko Angwenyi instructed by Mohammed Muigai LLP Advocates for the Appellant
2. Mr. Itonga instructed by K. Itonga & Company Advocates for the Respondent