



**Mwangi v Nairobi Academy (Employment and Labour Relations Appeal E028 of 2024) [2025] KEELRC 663 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 663 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E028 OF 2024**

**JW KELI, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**AUL MACHARIA MWANGI ..... APPELLANT**

**AND**

**THE NAIROBI ACADEMY ..... RESPONDENT**

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgment and Orders of the Honourable N. Ruguru (SPM) delivered at Nairobi on the 2<sup>nd</sup> February, 2024 in Nairobi ELRC No. 2145 of 2019 between the parties filed a Memorandum of Appeal dated 16<sup>th</sup> February, 2024 seeking: -
  - a. That the Appeal be allowed
  - b. The Judgment of the Magistrates Court in Chief Magistrates Court at Nairobi ELRC Cause No. 2145 of 2019 be varied and the appellant's claim for service gratuity be allowed as prayed in the memorandum of claim dated 27<sup>th</sup> November 2019.
  - c. Costs of this appeal be borne by the Respondent

**The Grounds of the Appeal**

2. The learned Magistrate erred in law and in fact in failing to find and hold that the Collective Bargaining Agreement between the Appellant and Respondent was the foundation of their employment relationship;
3. The Learned Magistrate erred in law and fact when she failed to determine that the Appellant is entitled to service gratuity for having worked for the Respondent for close to 23 years.



### **The Cross-Appeal (ELRCA NO E50 of 2024)**

4. The Cross-Appellant, The Nairobi Academy, filed an Appeal in ELRC Appeal No. E050 of 2024, which was consolidated with ELRCA NO E28 OF 2024, the appeals arising from the same judgment of the lower court. The Cross-Appellant being dissatisfied with the Judgment and Orders of the Honourable N. Ruguru (SPM) delivered at Nairobi on the 2<sup>nd</sup> February 2024 in Nairobi ELRC No. 2145 of 2019 between the parties, filed a Memorandum of Appeal dated 1<sup>st</sup> February 2024 and filed 1<sup>st</sup> March 2024 seeking the following orders:-
  - a. That the Appeal be allowed;
  - b. That the Judgment delivered on 2<sup>nd</sup> February, 2024 by the Hon. Ruguru N (Ms.) Senior Principal Magistrate in Milimani CMEL No. 2145 of 2019 Paul Macharia Mwangi vs The Nairobi Academy be hereby set aside;
  - c. That the Respondent's case in Milimani CMEL No. 2145 of 2019 Paul Macharia Mwangi vs The Nairobi Academy be dismissed with costs to the Appellant;
  - d. That cost of this Appeal be borne by the Respondent; and
  - e. That such further costs may be made by this Honourable Court as the court may deem fit to grant.

### **Grounds of the Cross- Appeal**

5. That the learned trial magistrate erred in law and in fact in making the finding that the Respondent was unfairly terminated which finding was against the weight of evidence on record and the law applicable in instances of constructive termination;
6. That the learned trial magistrate erred in law and in fact in making the finding that the Respondent was constructively dismissed for having not been taken through the disciplinary procedure encapsulated under the Employment Act, 2007 which finding was against the weight on record;
7. That the learned magistrate erred in law and in fact in making the finding that the disciplinary process was not followed yet it's the Respondent and the two union members that frustrated it by making compensation demand rather than focusing on the agenda of the Hearing;
8. That the learned Magistrate erred in law and in fact in making a finding that the Respondent's termination was constructive dismissal on the basis that the Appellant failed to reach out to the respondent for absconding duty which finding has no basis in law and was against the weight of evidence on record;
9. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's defence for lack of merit and substance which finding was without any reasoned justification and was against the weight of evidence on record;
10. That the learned magistrate erred in law and in fact in failing to take into consideration the Appellant's pleaded case in its Memorandum of Response, its evidence on record and submissions filed on its behalf thereby arriving at an erroneous decision;
11. That the learned trial magistrate erred in law and in fact in awarding the Respondent 5 months gross salary as compensation for unfair termination which award was excessive in the circumstances; and



12. That the learned trial magistrate erred in law and in fact by ignoring the applicable doctrine of *Ex turpi causa non oritur actio* by rewarding the Respondent for his own wrong of absconding duty.

### **Background To The Appeal And Cross Appeal**

13. The Claimant/Appellant filed claim against the Respondent vide a Memorandum of Claim dated 27<sup>th</sup> November, 2019 seeking the following orders:-
  - A. Damages as pleaded in paragraph 12 of the Claim;
  - B. Costs of the suit; and
  - C. Interest on i and ii above at court rates.
14. The Claimant filed his verifying affidavit, his statement and list of documents all of even date together with the bundle of documents (see pages 10-38 of ROA dated 11<sup>th</sup> September, 2024).
15. The claim was opposed by the Respondent who entered appearance and filed a response to Memorandum of Claim dated 6<sup>th</sup> February, 2020 (pages 41-42 of ROA), Respondent's list of witnesses (Pages 62 of ROA), Respondent's Witness statements of Paul Mungai dated 1<sup>st</sup> December, 2022, James Chege(undated), Joseph Mutugi(undated) (Pages 63-67 of ROA) and list and bundle of documents dated 2<sup>nd</sup> December, 2022(Pages 68-74 of ROA ).
16. The claimant's case was heard on the 2<sup>nd</sup> November, 2022 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent Ms. Wambugu (pages 99-100 of ROA).
17. The Respondent's case was heard on the same date where RW1 was James Chege Kirugu testified on behalf of the Respondent. He relied on his filed witness statement. He was cross-examined by counsel for the claimant Ms. Ngeresa (pages 100-101 of ROA)
18. The parties took directions on filing of written submissions after the hearing. The parties complied.
19. The Trial Magistrate Court delivered its Judgment on the 2<sup>nd</sup> February, 2024 awarding the claimant a total sum of Kshs. 403,276.39/= comprising of 5 months' salary as compensation for unlawful termination, four(4) months pay in lieu of notice, unpaid salary for the month of August and days worked in September, 2019 , and cost of suit and interest. (judgment at pages 103 to 108 of ROA).

### **Determination**

11. The appeal was canvassed by way of written submissions. Both parties complied.
11. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



11. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

### **Issues for determination**

20. The Appellant/Claimant submitted on the issues of gratuity and service pay and grounds in the cross-appeal as its issues for determination.
21. The Cross-Appellant addressed the grounds of appeal and cross-appeal as issues for the court’s determination.
22. The court was of the considered opinion that the issues placed before it in both the appeal and cross appeal were:- Whether the trial court erred in fact and law in finding unfair termination. Whether the trial court erred in fact and law erred in its findings on the reliefs sought.

### **Whether the trial court erred in fact and law in finding unfair termination**

23. The trial court held that the respondent/cross-appellant had raised two reasons that prompted the separation. The first reason being the Appellant had confessed to having stolen motor vehicle spare parts, and that amounted to gross misconduct. The appellant had also agreed to a salary deduction to cover the theft. The trial court on the reason, held that there was no record to show the appellant was in charge of the motor vehicle on the material day. The trial court stated that the respondent having withdrawn the reported case at the police station and further having not concluded the internal investigation to determine who was culpable, there was no justified reason for believing that the claimant was actively involved in the theft of the said motor vehicle parts. The second reason was of absconding duty without permission. The trial court relied on the case law to hold there was no evidence of the cross-appellant tried reaching out on the appellant’s whereabouts or reporting the case to the labour officer. (*Boniface Francis Mwangi v BOM Iyego secondary school* (2019)e KLR to effect that where the employee absconds work the employer should reach out. In *Joseph Nzioka v Smart Coatings Limited* (2017)e KLR in the reason of absconding the employer ought to issue notice of show cause why employment should not be terminated on ground of absconding). The trial court then found neither of the reasons was valid.
24. On procedural fairness, the trial court it was evident there was attempt to proceed with the hearing and the appellant admitted to have attended proceedings accompanied by 2 union representatives. The cross-appellant stated that the appellant and union officials focused on demanding his dues other than the hearing. The transport manager RW1 stated there were no minutes. The trial court held the process under section 41 of the Employment Act was not complied with.
25. The cross appellant grounds of appeal on the issue were as follows:-
  - a. THAT the learned trial magistrate erred in law and in fact in making the finding that the Respondent was unfairly terminated which finding was against the weight of evidence on record and the law applicable in instances of constructive termination;
  - b. That the learned trial magistrate erred in law and in fact in making the finding that the Respondent was constructively dismissed for having not been taken



through the disciplinary procedure encapsulated under the Employment Act, 2007 which finding was against the weight on record;

- c. That the learned magistrate erred in law and in fact in making the finding that the disciplinary process was not followed yet it's the Respondent and the two union members that frustrated it by making compensation demand rather than focusing on the agenda of the Hearing;
- d. That the learned Magistrate erred in law and in fact in making a finding that the Respondent's termination was constructive dismissal on the basis that the Appellant failed to reach out to the respondent for absconding duty which finding has no basis in law and was against the weight of evidence on record;
- e. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's defence for lack of merit and substance which finding was without any reasoned justification and was against the weight of evidence on record;
- f. That the learned magistrate erred in law and in fact in failing to take into consideration the Appellant's pleaded case in its Memorandum of Response, its evidence on record and submissions filed on its behalf thereby arriving at an erroneous decision;'

26. The court's duty at first appeal is to re-evaluate the evidence before the lower court and reach its conclusion (*Selle v Associated Motor Boat Co.* [1968] EA 123 ). On the two reasons advanced by the cross-appellant for the separation. On the reasons of theft, the trial court held that the cross-appellant having withdrawn the police case and the internal investigations having not been concluded to establish culpability, the reason was not believable. On the reason of absconding there was no prove of show cause on the same.
27. At cross-examination, the appellant stated while in custody of police on the issue of arrest for the theft, the manager of the cross-appellant brought him a written letter dated 25<sup>th</sup> August 2019 to sign admitting the crime. That he did not read it before signing (cross-examination of claimant at pages 105-106 of cross-appeal). RW1 told the court they withdrew the police case to deal with the matter administratively. In witness statement of the claimant /appellant in paragraph 6 and 7, he stated to have been threatened/coerced to signing the letter purporting to be a confession to the alleged crime (of stealing motor vehicle spare parts) and wished to retract the purported confession as it was obtained through threats, intimidation and undue influence. The Cross-appellant at the hearing produced letter dated 26<sup>th</sup> August 2019 addressed to the police to the effect that the suspects admitted liability and had put it writing (Page 47 of cross-appeal).
28. The court on re-evaluation of the evidence at lower court especially the two letters, of confession and withdraw of the police case found that the trial court did not explain why it did not consider the confession leading to withdraw of the case. The appellant was released from the police custody on the basis of admission of culpability. He had all time to retract the confession including when he appeared with the union officials for disciplinary hearing but did not. The court found it was an afterthought for purposes of the case to allege threats towards the confession. The claimant/ appellant benefited from



the confession which set him free from further criminal process. He cannot have his cake and eat it. The court on the first reason found it met the threshold of section 43 of the Employment Act to wit:-

“43(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

29. On the second reason of absconding, It was the cross-appellant’s case that the appellant’s employment was not terminated. In witness statement of Paul Mungai Karanja (RW1) It was stated; ‘it is my testimony that Mr. Paul Macharia was never terminated at all but he chose to bluntly abscond duties.’ Paul was the appellant. On the reason of absconding, while the same is a gross misconduct under section 44(4)a of the Employment Act, the court agreed with the trial court that the cross-appellant did not issue show cause of intention to terminate the employment on basis of absconding. The court upheld the decisions relied on by the appellant in *Boniface Francis Mwangi v BOM Iyego secondary school* (2019)e KLR to effect that where the employee absconds work the employer should reach out. In *Joseph Nzioka v Smart Coatings Limited* (2017)e KLR, where the reason of absconding exists, the employer ought to issue a notice of show cause why the employment should not be terminated on grounds of absconding. At cross-examination, RW1 for the cross-appellant stated there was no termination as the appellant bluntly absconded duty. The employer then ought to have taken steps towards ending the employer employee relations according to section 41 of the Employment Act. Having failed to do so, the court returned the termination as unfair. Consequently, for the foregoing reasons, the court upheld the finding of unfair termination on both substantive (absconding only) and procedural.

#### **Whether the trial court erred in fact and law erred in its findings on the reliefs sought.**

30. The cross-appellant raised the following prayers under the issue :-
- a. That the learned trial magistrate erred in law and in fact in awarding the Respondent 5 months gross salary as compensation for unfair termination which award was excessive in the circumstances; and
  - b. That the learned trial magistrate erred in law and in fact by ignoring the applicable doctrine of *Ex turpi causa non oritur actio* by rewarding the Respondent for his own wrong of absconding duty.
31. The appellant raised the following grounds under the issue:-
- i. The learned Magistrate erred in law and in fact in failing to find and hold that the Collective Bargaining Agreement between the Appellant and Respondent was the foundation of their employment relationship;
  - ii. The Learned Magistrate erred in law and fact when she failed to determine that the Appellant is entitled to service gratuity for having worked for the Respondent for close to 23 years.

#### **On compensation for unfair termination**

32. The trial court found unfair termination and stated that the conduct of the respondent was without rationale, factored the length of service and period expected to serve and awarded the appellant the equivalent of 5 months’ gross salary. The cross-appellant stated that the learned trial magistrate erred in law and in fact by ignoring the applicable doctrine of *Ex turpi causa non oritur actio* by rewarding the Respondent for his own wrong of absconding duty.



33. The court on re-evaluation of the evidence found that the trial court erred by not finding the appellant as culpable of the theft yet he admitted to the crime. The court found that the termination was not fair for failure to comply with section 41 of Employment Act on reason of absconding. Consequently, the court returned that the appellant should not have been compensated having admitted to the crime. The notice pay suffices under section 49 of the Employment Act. The compensation is set aside.

**Notice pay.**

34. The termination was upheld was unfair for noncompliance with section 41 of the Employment Act. The award of notice pay for 4 months gross salary is upheld in accordance with the CBA between the parties.

**Service pay /gratuity.**

35. The appellant's grounds of appeal was:- the learned Magistrate erred in law and in fact in failing to find and hold that the Collective Bargaining Agreement between the Appellant and Respondent was the foundation of their employment relationship and the Learned Magistrate erred in law and fact when she failed to determine that the Appellant is entitled to service gratuity for having worked for the Respondent for close to 23 years.

36. The court upheld the authorities cited by the cross-appellant on payment of service pay under section 35(6) of the Employment Act to wit :- "(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

- "(6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
  - (b) a gratuity or service pay scheme established under a collective agreement;
  - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
  - (d) the National Social Security Fund."

The court agreed with the appellant that Collective Bargaining Agreement between the Appellant and Respondent was the foundation of their employment relationship. Section 35 (6) of the Employment Act relates to basic minimum terms and conditions of employment. Section 26 of the Act expounds on the same as follows:-

- "26. Basic minimum conditions of employment
- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
  - (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment



and Labour Relations Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.”

Thus, where there is a CBA with more favorable terms than the minimum terms and conditions of employment, the CBA prevails. Thus though the appellant was under NSSF, on finding unfair termination on the reason of absconding which was not proved, the right to service pay of the appellant crystallised. RW1 stated the employment was not terminated but the appellant who absconded. The Cross-appellant did not take steps to end the employment relations under section 41 of the Employment Act. The trial court then held there was prove of constructive dismissal which was unfair.

37. The CBA was before the trial court. Clause 18 of the CBA provided for retirement/service gratuity as follows:- ‘an employee shall be entitled to retirement benefits of service gratuity of one month’s wages for each completed year of service at the rate being earned at the time of departure if:-
- “ a. The employee retires.....
  - b. The employee’s services are terminated for reasons other than gross-misconduct.”(Page 26 of ROA)
38. The appellant stated that the issue of gross-misconduct having been cleared he was entitled to payment of service pay for 23 years worked. The cross-appellant submitted that clause 18 (c) of the CBA merely indicated the intention to set up a pension scheme. That the appellant’s case was the pension scheme having not been set up the gratuity was payable. That the CBA neither created a legally binding obligation or guaranteed the appellant’s entitlement to it and in any event the appellant was on NSSF all through employment and referenced to clause 23 of the CBA on NSSF.
39. The cross-appellant relied on the decision of Kenya and Allied Workers Union v Alfajiri Villas( Magufa) Limited (2014)e KLR where justice Radido held that where an employee is covered under NSSF they cannot validly claim gratuity unless provided for in a contract or a CBA. That is good law and the court upheld the decision and asked itself whether the claim for service gratuity as stated in clause 18 (b)of the CBA was legally binding on the employer. (page 26 of ROA) There was no dispute as to the validity of the CBA. The notice pay for 4 months was awarded under Clause 6 of the CBA(Page 22 of ROA). The cross-appellant relied on the clause 18(c) which stated:- ‘The management of Nairobi Academy is in the process of introducing pension scheme , which shall be agreed upon by both parties and once agree, shall supercede the retirement/service gratuity clause in this agreement”. According to Concise Oxford English Dictionary the word ‘supercede” means to take the place of; supplant. The court held that there is no ambiguity in reading clause 18 (b) of the CBA, that the service gratuity was payable to employees who were terminated for any reason other than gross misconduct and this would only stop once there was an pension scheme in place under clause 18(c). There was no evidence of the existence of pension scheme as per clause 18(c). the court held that Clause 18(b) of the CBA was legally binding on the parties.
40. On whether the appellant being under NSSF was not entitled to service gratuity under the CBA, the court held that section 26 of the Employment Act allowed the employer and union to negotiate CBA above basic minimum terms of service which they did despite having the basic minimum social security of NSSF. The Appellant was entitled to service gratuity under Clause 18(b) of the CBA in addition to NSSF. The Appellant was employed on 9<sup>th</sup> September 2019 thus had completed 23 years of service. The last salary was Kshs. 38870.10 thus award of KSHS. 894,012.30 equivalent of one month’s salary for each year served.



### **Award of unpaid salary**

41. On the award of unpaid salary it was not in disputed the last day the appellant was at the employment was 9<sup>th</sup> September 2019 when he attended the aborted disciplinary hearing. The court found no basis to disturb award of unpaid salary.

### **Conclusion**

42. The appeal is held as partially successful on the compensation award of Kshs 194,350, which is set aside in entirety. The cross-appeal is allowed. The Judgment and Decree of Hon Ruguru. N. (SPM) dated 2<sup>nd</sup> February 2024 in Milimani Commercial CMELR NO. 2145 OF 2019 is set aside and substituted as follows:-
1. A declaration that the claimant's termination was both procedurally and substantially unfair.
  2. Four (4) months salary in lieu of notice Kshs. 155,480
  3. Unpaid salary for the month of August 2019 Kshs. 38870.10
  4. Unpaid Salary of 9 days of September 2019 Kshs. 14,576.29
  5. Service gratuity Kshs. 894,012.30  
Total sum Kshs. 1,102,938.69(payable subject to statutory deductions)
  6. Costs and interest at court rate from the date of judgment until payment in full.
43. Each party to bear own costs at appeal and cross-appeal.
44. Stay of 30 days.
45. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellant :- Ms. Ngeresa

Cross-appellant :- Ms. Mathu h/b Mwangi

