



Kitiri Dairy and Investment Co-operative Limited v Kaguthi (Employment and Labour Relations Appeal E007 of 2023) [2025] KEELRC 541 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2023
AN MWAURE, J
FEBRUARY 26, 2025**

**BETWEEN
KITIRI DAIRY AND INVESTMENT CO-OPERATIVE LIMITED .. APPELLANT
AND
JANE NYAMBURA KAGUTHI RESPONDENT**

(Being an Appeal from the Judgment and Decree of Honourable Ruth Kefa Chebesio, Principal Magistrate, delivered on 7th December, 2023 in Nakuru MCELR Case Number 393 of 2019)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and decree of Honourable Ruth Kefa Chebesio, Principal Magistrate, filed this appeal vide a Memorandum of Appeal dated 25th April 2024 on the following grounds that:
 1. The learned trial magistrate erred in law and in fact, in finding the Respondent was unlawfully terminated from her employment with the Appellant.
 2. The learned trial magistrate erred in law and, in fact by failing to consider that the Respondent was employed as an Accountant and, thus, her employment did not fall under the provisions of the Regulations of Wages (Agricultural Industry) (Amendment) Order, 2017 and the Regulation of Wages (General)(Amendment) Order, 2017 and therefore arrived at a wrong finding on the issue of underpayment.
 3. The learned trial magistrate erred in law and in fact by rendering a Judgment which is at great variance with the evidence that was tendered before the Trial Court during the hearing, and indeed, the Trial Court reached its determination without regard to the documents, submissions and the evidence tendered on behalf of the Appellant.



4. The learned trial magistrate erred in law and, in fact, by failing to make a determination on the issue of the Respondent absconding her duties upon being requested to provide her academic qualifications by the Appellant.
 5. The learned trial magistrate erred in law and, in fact, by failing to consider the evidence placed before the court, proving that the Appellant made an effort to reach the Respondent after she absconded her duty.
 6. The decision of the learned trial magistrate contravened the weight of evidence adduced before the court.
 7. The learned trial magistrate misdirected herself on issues of law and fact by failing to take into consideration matters and/or facts which she should have taken into consideration and, in doing so, arriving at a wrong decision.
 8. The learned trial magistrate misdirected herself on issues of law and fact and, therefore, arrived at a wrong finding.
 9. The Judgment and Decree of the Honourable Trial Court is a grave miscarriage of justice and should be set aside.
2. The Appellant prays that:
 - a. The appeal be allowed, and the learned Magistrate's Judgment delivered on 7th December, 2022 be set aside and be substituted with an order dismissing the Respondent's suit against the Appellant with costs.
 - b. The costs of this Appeal be awarded to the Appellant
 3. Both parties canvassed the appeal by way of written submissions.

Appellant's submissions

4. The Appellant relied on the case of *Ingati & Another V Amulyoto & another* [2022] KEELC 3839 the court stated that, as this is a first appeal, its role is to re-evaluate, reassess, and analyze the record. The court must determine whether the conclusions reached by the learned trial magistrate should be upheld, and provide reasons for its decision. Additionally, the court must keep in mind that it has not heard the witnesses and should, therefore, consider this fact accordingly.
5. The Appellant submitted that the Respondent absconded from her duties upon request to avail her academic certificates and professional testimonials, which she failed to produce.
6. The Appellant submitted that during the hearing in the trial court, the Respondent did not provide the requested academic certificates and professional testimonials. As a result, the Appellant was convinced that she was not a qualified accountant, and her employment with the Appellant was based on misrepresentation and false pretences
7. The Appellant submitted that the Respondent was not discharging her duties properly at work, which led the Appellant to request her academic certificates and professional testimonials. The Respondent then requested and took her annual leave, during which she neglected her duties and ultimately deserted her job.



8. The Black's Law Dictionary 9th Edition defines desertion as follows:

“The will and unjustified abandonment of a person's duties and obligations.”

9. The Appellant relied on the case of Judith Atieno Owuor V Sameer Agriculture and Livestock Limited [2022] eKLR the court cited the South African case of Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA) the court stated that desertion is different from absence without leave, as it involves an employee leaving his or her post with the intention of not returning, or deciding not to return after having already left his or her post.

10. The Appellant submitted that after the Respondent absconded her duties, the Appellant made efforts to reach out to her vide a letter dated 15th March 2019, which was produced in court to reconcile, but the Respondent did not make any effort to respond and furnish the academic certificates and professional testimonials as requesting thus leading to her termination.

11. The Appellant relied on Judith Atieno Owuor V Sameer Agriculture and Livestock Limited (supra), where the court cited the case of Felistas Acheha Ikatwa V Charles Peter Otieno [2018] eKLR the court held that it is well settled in law that an employer alleging that an employee has deserted their job must show the efforts they made to get the employee to return to work.

12. The Appellant justified its reasons for terminating the Respondent's employment as set out in Section 44(3) of the *Employment Act*, which provides as follows:

“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

13. The Appellant argued that the Respondent failed to report to work after her annual leave without notice she was requested to furnish her academic certificates and professional testimonials, hence deserting her job. The Appellant further argued that despite the issuance of the letter dated 15th March 2019, the Respondent did not have any intentions of reporting back to her work.

14. The Appellant submitted that there was no unfair dismissal on its part as the Respondent failed to adduce evidence to rebut its evidence in the trial court that she deserted her job. The Appellant also submitted that the Respondent is not entitled to any reliefs sought as she was dismissed on account of summary dismissal as set out under section 44(3) of the *Employment Act*. The Appellant reiterated that the Respondent absconded her duties and she is not entitled to compensation as stipulated under section 49 of the *Employment Act*.

15. The Appellant relied on sections 35(5) and 35(6) of the *Employment Act* provides as follows:

5. An employee whose contract of service has been terminated under subsection (1)(c) is 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.”



16. The Appellant submitted that the Respondent is not entitled to the gratuity or service as she was a member of NSSF with consistent monthly contributions made. For the claim for underpayment, the Appellant submitted that the Respondent does not fall under the Regulation of Wages (Agricultural Industry) (Amendment) Order 2017 and the Regulation of Wages (General)(Amendment) Order 2017. The Appellant submitted that the Respondent is not entitled to the sum of Kshs.968,431.30/= for underpayment.
17. The Appellant submitted that the Respondent did not request for a certificate of service, which was available upon the request by the Respondent.
18. The Appellant argued that the Respondent admitted to Kshs. 23,775/=, which was the amount pleaded in the counterclaim and therefore, the Appellant submitted that it is entitled to the said amount.
19. The Appellant submitted that the Respondent should bear the costs of the appeal and, therefore, allow the appeal as prayed.

Respondent's submissions

20. The Respondent submitted that she was not accorded a fair hearing, which should be reasonable and just, providing reasons for termination and following procedural fairness in line with Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act* as both set out the significance and central role of due process and fairness in all administrative actions.
21. The Respondent also submitted that substantive justification and procedural fairness go hand in hand with two pairs of stocks where an employer fails to follow both in any disciplinary proceedings therefore, the disciplinary process will be deemed unlawful as it was held in *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR and *Walter Ogal Anuro V Teacher Service Commission* (2012) eKLR.
22. The Respondent argues that she was not accorded a fair hearing according to the law and, therefore, urges this Honourable to find that she was unlawfully and unfairly terminated.
23. In the judgment by the learned trial magistrate dated 7th December 2022, she stated as follows:

“The letter dated 15th March, 2019 indicates that the Claimant left employment after she failed to submit professional certificate to felicitate formal employment. However, there is no indication that the Respondent explained to the Claimant the consequences of failing to submit the certificates and further invited her for a disciplinary hearing for absconding duties.

The Claimant’s employment was terminated without giving her fair hearing or reasons for termination of her employment. Her employment was unfairly terminated hence, I will grant her six months’ pay under section 49 of the *Employment Act* No. 11 of 2007.”
24. In conclusion, the Respondent urges this Honourable Court to dismiss the appeal.

Analysis and determination

25. The court has considered the memorandum of appeal, the record of appeal as well as the submissions by both parties, the issue of determination is whether the appeal is merited.



26. In *The German School Society & another V Ohany & Another* [2023] KECA 894 (KLR), the Court of Appeal stated as follows:

“In order for termination to be fair in the eyes of the law, it has to be both substantively and procedurally fair. The employer needs to have a valid and fair reason for termination. Apart from a valid reason of termination, the employer must follow fair procedures for termination in accordance with the *Employment Act*. In any form of termination, the employer is required to prove the reasons for the termination otherwise it will be termed as unfair.”

27. In *Walter Ogal Anuro V Teachers Service Commissions*(supra), the court held that:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

28. In *Loice Otieno V Kenya Commercial Bank Limited*(supra), the court also held that the Claimant’s termination was procedurally unfair, as it did not comply with section 41 of the *Employment Act*. The Claimant’s appeal against the termination did not rectify this procedural flaw. Consequently, the court deemed it unnecessary to discuss whether the Respondent had proven the reasons for the termination or whether those reasons were fair and valid under Sections 43 and 45 of the *Employment Act*.

29. In this instant appeal, the Appellant provided no valid reasons for terminating respondent’s employment. On 12th September 2018. It is the respondent’s story that when she reported to work on 10th September 2018 she was told that she was terminated.

August 2017 the respondent went on leave and reported back on 7

30. The appellant on the other hand avers that they asked the Respondent for her academic certificates and she did not provide the same but instead absconded from work. The court notes that the respondent had been employed in March 2015 as an accountant. It is incredible that for all that period the appellant did not have the respondent’s certificates. And yet a position of an accountant is a sensitive position and is unbelievable that one can just be employed without any certificates.

31. There is a letter produced in court dated 15th March 2019 where the Respondent is being told she refused to submit her academic documents. The court did not see any other evidence that the Respondent was ordered to produce her academic documents. This was in any event many months since she had left employment in September 2018.

32. In any event if the respondent absconded employment the appellant did not present evidence of such desertion and that they invited her for a disciplinary hearing on grounds of desertion.

Desertion of employment is a serious misconduct that can amount to termination of employment of an employee. However, it is not enough for an employer to claim there was desertion. He must prove he tried to reach out to the employee and to take him through disciplinary process on the grounds of desertion.

33. In the case Appeal E109 of 2023, *Owudu -vs- Digital Sanitation Services Limited* the court held:

“First an employer does terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to employee



to render an account on his misconduct where employee persists and fails to abide by such direction the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employee.”

34. In the present case there is no evidence that the appellant followed the process mandated in Section 41 of the *Employment Act*. The respondent was not invited for a disciplinary hearing in the presence of an employee of her choice or a union representative in the event the Respondent was a member of the union.
35. The court holds the appellant failed to prove a valid reason to terminate the respondent as well as procedural fairness as set out in numerous case laws (also among them *The German School Society & Another -vs- Ohany & Another (2023) KECA* and *Walter O. Anuro -vs- Teachers Service Commission (Supra)*).
36. The Appellant in filing the appeal did not provide sufficient evidence to justify its action in terminating the Respondent’s employment without a fair hearing. The Appellant did not make any effort to reach out to the Respondent to defend herself against the allegations levelled against her.
37. In view of the foregoing, the court finds the appeal lacks merit and is dismissed.
38. Having found that the trial magistrate was right in entering judgment in favour of the respondent however this court finds that she exceeded her mandate in awarding reliefs some of which are not even claimed in the pleadings.
39. The court therefore will replace the following awards in place of the trial magistrate awards as follows: -
 - a. Unpaid salary upto 10th September 2018....Kshs.5,833/=
 - b. One-month salary in lieu of noticeKsh.17,500/=
 - c. Accrued annual leave is not proved and in the documents produced in court the Respondent was given some, leave days. The leave days is not proved and is disallowed.
 - d. Under payment is also not proved as Respondent accepted her salary all those months without raising any issues. Further her position is a professional position.
That relief is disallowed.
 - e. House allowance is allowed.....Kshs.110,250/= as there are no documents from the appellant to support that her salary was inclusive of house allowance.
 - f. Damages for unlawful termination.....Kshs.105,000/= is upheld at 6 months.
Total award isKshs.238,583/=
 - g. Interest is awarded at 14% per annum from date of this judgment till full payment.
 - h. Costs are awarded to the Respondent both of the lower court and of this court based on this award.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE



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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

