



REPUBLIC OF KENYA



KENYA LAW
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Muani v Epcu Builders Limited (Employment and Labour Relations Appeal E080 of 2023) [2025] KEELRC 476 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E080 OF 2023**

JW KELI, J

FEBRUARY 20, 2025

BETWEEN

TOM MUTUNGA MUANI APPELLANT

AND

EPCO BUILDERS LIMITED RESPONDENT

JUDGMENT

1. Tom Mutunga Muani, the Appellant herein, being dissatisfied with the judgment of the Chief Magistrate's Court in CMEL No. E541 of 2022 - Tom Mutunga Muani -vs- Epcu Builders Limited, by Hon. B.M Cheloti (SRM) delivered on 5 May, 2023, appealed against the whole judgment vide a memorandum of appeal dated 24th May 2023 seeking the following reliefs:-
 1. This Appeal be allowed and the orders issued on 5th May, 2023 dismissing the Appellant's Statement of Claim with no order as to costs be set aside.
 2. The Appellant be awarded terminal dues payable as prayed in his statement of claim dated 18th March, 2022.
 3. The Respondent do pay the costs of this Appeal and costs at the subordinate court in CM.E&LRC Case No. E541 OF 2022.
 4. Any other order and relief that this Honourable Court may deem fit and just to grant.
2. Grounds of the appeal.
 - a. That the learned Honourable Magistrate erred in law and in fact by dismissing the Appellant's claim against the weight of the evidence presented and applicable law.
 - b. That the learned Honourable Magistrate erred in law and in fact by dismissing the Appellant's case without framing all the issues for determination and without providing adequate reasons.



- c. That the learned Honourable Magistrate erred in law and in fact in disregarding the Appellant's evidence, submissions and judicial authorities cited.
- d. That the learned Honourable Magistrate erred in law and in fact in finding that the Appellant failed to prove his case on the balance of probability.
- e. That the learned Honourable Magistrate erred in law and in fact and misdirected herself by failing to make a finding that the decision by the Respondent to terminate the Appellant on grounds of absconding duty was illegal and unlawful, thus presenting a miscarriage of justice.
- f. That the learned Honourable Magistrate erred in law and in fact by failing to exercise judicial authority on known legal principles with respect to termination on grounds of absconding duty hence rendering a biased, unjust and an inconsistent decision.
- g. That the learned Honourable magistrate erred in law and in fact by shifting the burden of proof to the Appellant with respect to communication yet the burden of proof rested upon the Respondent to prove that they reached out to the Appellant if in any case the Appellant absconded.
- h. That the learned Honourable magistrate erred in law and in fact by failing to consider the two limbs of fairness before coming to the conclusion that the Appellant's dismissal was not unfair.
- i. That the learned Honourable Magistrate erred in law and misdirected herself by disregarding the Appellant's claim for Notice pay, House Allowance, Annual leave and service pay without providing adequate reasons.
- j. That the learned Honourable Magistrate erred in law and in fact in not awarding the appellant his terminal dues for the years served.
- k. That the Magistrate erred by failing to establish that the Respondent had not tabulated the terminal dues payable to the Appellant and failing to compute the same.

Background to the appeal

3. The claimant/Appellant alleging unlawful and unfair termination of employment by the Respondent filed a statement of claim before the lower court dated 18th March 2022 seeking the following reliefs:-
 - a. A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair.
 - b. The sum of Kshs. 784,245.00 particularized in paragraph *para_16 16* above.
 - c. Certificate of service
 - d. Costs of this suit.
 - e. Interest on the amount awarded at court rates. (page 7 of ROA).
4. The Appellant filed together with the claim his verifying affidavit, his witness statement of even date, list of documents of even date together with the bundle of documents. (pages 4-24 of ROA was the claimant's case).
5. The Respondent entered appearance through the law firm of Okwach and Company advocates and filed a defence statement dated 8th April 2022 in opposition to the claim and a witness statement of Bernard Owino dated 13th July 2022 (pages 25-31 of ROA was the defence case).



6. The claimant's case was heard on the 16th February 2023 where he testified on oath as only witness and was cross-examined by counsel for the respondent. The Respondent's case was heard on even date where Bernard Owino testified for the Respondent as a witness of fact and was cross-examined by counsel for the appellant. The parties took directions of filing of written submissions after the hearing and both complied (pages 95-99 of ROA were the lower court proceedings).
7. The Trial Magistrate Court delivered judgment in the claim on the 5th May 2023 where the claim was dismissed save for certificate of service. The lower court held the termination was lawful and fair. (Judgment and Decree at pages 100-102 of ROA)

Determination

8. The appeal was canvassed by way of written submissions. Both parties complied.
9. 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."

Issues for determination

10. The appellant addressed all grounds of the appeal as issues.
11. The Respondent identified two issues for determination in the appeal namely-
 - a. Whether the appellant proved that he had not absconded duty.
 - b. Whether the appellant was entitled to terminal dues sought.
12. The court having perused the judgment, the pleadings, and the grounds of appeal was of the considered opinion that the issues placed before the court at the first appeal for determination were as follows:-
 - a. Whether the trial court erred in law and fact in finding the termination was lawful and fair
 - b. Whether the Appellant was entitled to the reliefs sought.

Issue 1. Whether the trial court erred in law and fact in finding the termination was lawful and fair

13. The test of whether a termination of employment is lawful and fair is according to the provisions of section 45(2) of the *Employment Act* to wit:- "45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and



- (c) that the employment was terminated in accordance with fair procedure.”
14. The Court discerned from the foregoing provisions (section 45(2) of the *Employment Act*) that there are two components of termination fairness, (1) fair reasons related to the employee’s conduct, capacity, or compatibility or based on the operations requirements of the employer(section 43 of the *Employment Act* on prove of reasons by the employer) and (2) procedural fairness(section 41 on procedural fairness of the *Employment Act*).
15. The court (Justice Linnet Ndolo) in *Walter Ogal Anuro v Teachers Service Commission (2013)e KLR* held that:- “22. In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant’s employment as required under Section 43 of the *Employment Act*. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.” The position was consistent with the provisions of section 45(2) of the *Employment Act* and the decision was upheld to apply in the instant appeal.
16. The burden of prove in employment claims is according to the provisions of section 47(5) of the *Employment Act* to wit:- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
17. The trial court held that the appellant failed to prove unfair termination beyond a balance of probability (page 102). The court with respect to the trial court, the burden in employment claim is that in civil case of balance of probabilities and not beyond.
18. The claimant on the unfair termination adopted his witness statement where he stated that on the 9th February 2019, he was involved in an road accident and was rushed to Machakos Level 5 hospital and was admitted. He called the respondent’s transport manager one Mr. Karsanbhai Kerai who sent him KShs. 2000 for treatment, he informed the transport manager that the doctor had advised him to be off duties until 15th May 2019. The Claimant stated that the transport manager told him that was okay and he should report to work once he was okay. On 16th May 2019, he reported back to work and was summoned by the Human resources manager who issued him with a summary dismissal letter stating he had absconded duty. He tried to explain but the said human resource manager ordered him out and ordered security guards not to let him in. In support of his case, the appellant produced before the trial court documents related to the accident and MPESA statement as C-exh 1-8. RW stated the appellant got the police abstract after the accident.
19. The burden of prove of the reason(s) for the termination lies with employer according to section 43 of the *Employment Act* to wit:- “43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (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.”
20. The respondent in the witness statement of Bernard Owino stated that the appellant absconded duty from 11th February 2019 until 16th May 2019 without explanation of his whereabouts. That the alleged KShs. 2000 the appellant is alleged to have received from the transport manager(Kerai) was sent to him on Kerai’s behalf and not that of the respondent.



Appellant's submissions

21. The appellant relied on facts in his witness statement on the accident. He was authorized by the transport manager (Kerai) having informed him on the doctor's report which gave him off duty. The appellant submitted that he did not abscond duty and therefore the burden shifted to the respondent to prove he absconded duty. The appellant relied on the decision in *New World Stainless Steel Limited v Cosmas Mbaulu Munyasya (2021) e KLR* on absconding where the court observed:- "The Appellant's line of defence before the trial court was that the Respondent himself had absconded duty, the corollary being that his employment had not been terminated. When an employer takes this line, they place on themselves the burden to prove that the employee had in fact absconded duty."
22. Absconding or deserting duty is not the same as absenteeism in that an absconding or deserting employee has formed the intention not to return to work. This distinction was well captured in the persuasive South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* as follows:-

"....desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.
23. The appellant submitted there was no effort by the employer to reach him on the alleged absconding and the said absconding was an afterthought defense. That there was no hearing before the termination.

Respondent's submissions

24. The Respondent relied on the provisions of Sections 107, 108, and 109 of the *Evidence Act* which provides as follows:"
 107. Burden of proof (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
25. The Respondent submitted that the Appellant failed to prove that he had not absconded from work as follows: -
 - i. He did not have any proof that he provided the Respondent with the Documents at pages 17 – 21 of the Record of Appeal (hereinafter referred to 'the ROA') indicating the alleged reason for his failure to report back to work, during his absence from work, when he reported back to work or at all.



- ii. Although the alleged accident occurred on the 9th February 2019, the document at page 17 of the ROA from Machakos Hospital has an entry date of 15th May 2019 and the hospital stamp thereon is for 14th May 2019.
 - iii. To make matters worse, the Appellant reported back to work three months' later as admitted by him in his Witness Statement at page 10 of the ROA.
 - iv. The Police Abstract at page 19 of the ROA was issued on the 17th January 2020 yet the alleged accident occurred a year before on the 9th February 2019.
 - v. The P3 at pages 20 – 21 of the ROA was issued in the 15th January 2020 yet the alleged accident occurred a year before on the 9th February 2019.
 - vi. He neither provided any Medical Report that diagnosed the injuries he allegedly sustained nor Medical payment receipts for the same.
 - vii. He did not have any proof that he provided the Respondent with the said medical records to prove that indeed he was in an accident.
26. The Respondent submitted that it agreed with the finding of the Trial Magistrate in her judgement at page 102 of the ROA as follows: “13. I am of the opinion that the Claimant has failed to satisfy this court that his termination was unlawful...as he never tabled any evidence to prove communication with the Respondent. The medical record dated 9th February 2019 indicates he should have been off duty until 21st April 2019 and not 15th May 2019. 14. The burden of proving unfair termination wholly rests on the Claimant of which he has failed to argue beyond a balance of probability”
27. The respondent further relied on the provision of Section 44(4) of the [Employment Act](#) which provides that:- “Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...if (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;” In the case of *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR*, the learned judge held that:- “36. The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labor Court in *SACWU v Dyasi [2001] 7 BLLR 731 (LAC)* the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence... he had the choice of making an application in compliance with the respondent’s operational requirements and failure to do so and continued absence establish the fact of desertion. Absence from work without a justifiable reason or permission and or authorization and notice to the employer is a subject for summary dismissal under section 44 of the Act.”
28. The Respondent contended that on the 9th February 2019, the Appellant never reported to work. The Respondent patiently waited to hear from the Appellant to no avail. After not seeing or hearing from him for over a month, the Respondent summarily dismissed him on the 21st March 2019 for absconding duty. It was not until three months after the alleged accident occurred that the Appellant purported to report back to work with no proof of where he had been for all that time. Also, the Appellant has failed to prove that he was indeed unwell. He did not provide the Medical Report and the Medical receipts for the accident to either the Respondent nor the court and the Police Abstract



and the P3 are dated almost a year after the alleged accident occurred. This is a clear indication that the Appellant most likely is lying to the court in the hopes of creating a make-believe story on how his employment was terminated.

29. The Respondent submitted that the Appellant terminated the contract of employment when he breached his duty to report to work. As such, there was no need for the Respondent to undertake any other termination procedures. Moreover, it does not make sense for the Appellant to turn around and blame the Respondent for releasing him when he never attempted to contact the Respondent. It is quite evident that this suit is based on facts that do not add up let alone prove to exist. It is a failed attempt by the Appellant to milk money from the Respondent and is also an evident afterthought by him being filed almost 3 years after the alleged cause of action occurred in May 2019. It is on the foregoing submissions that the Respondent prays that the suit be dismissed with costs.

Decision.

30. The appellant told the trial court that on reporting back to work on the 16th May 2019 the human resources manager issued him with a letter of summary dismissal and did not hear him. The letter was produced before the trial court and the respondent admitted to have issued the letter. The reason for termination was absconding duty. The letter was dated 21st March 2019 and stated:-

“Dear Mutunga,

Re: Summary Dismissal Owing To Absconding Duty

As per regulations, you are well aware that if any employee who does not report to duty for continuous seven(7) days without notice or communication, the company entails summary dismissal for the employee as per the law.

Accordingly, the company terminates your services under summary dismissal since you have not reported to work nor issued an explanation from 11th February 2019 up to date.

You are therefore required to return any company property in your possession to your immediate supervisor.

Yours faithfully,

EPCO Builders LTD.”

The letter was signed by Mayur R Varsani –Director and B. Owino H.R Officer.(Page 16 of ROA).

31. The court was persuaded by the position taken in New World Stainless Steel Limited v Cosmas Mbaulu Munyasya (2021) e KLR on absconding where the court observed:- “The Appellant’s line of defence before the trial court was that the Respondent himself had absconded duty, the corollary being that his employment had not been terminated. When an employer takes this line, they place on themselves the burden to prove that the employee had in fact absconded duty.” (emphasis given)
32. Absconding or deserting duty is not the same as absenteeism in that an absconding or deserting employee has the intention not to return to work. This distinction was well captured in the persuasive South African case of Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA) as follows:
- “...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should



demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.

33. How does an employer discharge its burden in proving that an employee has absconded duty? Flowing from case law(supra) it is firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee to put them on notice that termination of their employment on this ground is being considered consistent with the provisions of section 41 of the *Employment Act*. (see also Stanley Omwoyo Onchwari v Board of Management Nakuru YMCA Secondary School [2015] eKLR and Dickson Matingi v Db Schenker Limited [2016] eKLR).
34. Contrary to the finding of the trial court, the court at first appeal was satisfied that the claimant/ appellant discharged his burden under section 47(5) of the *Employment Act* by stating his job was unlawfully and unfairly terminated based on balance of probabilities for the reason that he produced without any objection documents at page 18(ROA) from Machakos Referral Hospital dated 9th February 2019 indicating history of treatment and giving off duty until 21st April 2019 and another document from same hospital dated 15th May 2019 stating he had healed for light duties. This is a public hospital and there was no basis to doubt the record. The appellant stated he informed his boss the transport manager by the name Karsanbhai Kerai of the accident and even produced undisputed evidence that the said officer sent him vide Mpesa Kshs 2000 for treatment on 10th February 2019, 2nd day of the accident. The Respondent's witness stated the money was personal without any basis like a statement by Kerai denying having received information from the appellant of the accident, the reason he sent the Kshs. 2000 and of having allowed him to be away from duty till he recovered. The respondent did not deny Kerai was the immediate boss of the claimant or was a supervisor at the Respondent.
35. The standard of proof in employment claims is the same as in civil cases being on balance of probabilities. The court held that the trial court erred in applying standard of proof of beyond balance of probabilities. The court found the appellant proved he notified the respondent of the accident going by the above analysis as was held in of Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR, where the learned judge held that, "36. The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employee was."
36. The court on the first appeal found the burden of proof shifted to the respondent to justify the reason for the termination according to section 47(5) (supra) and section 43 of the *Employment Act* to wit:-
43. Proof of reason for termination
 - (1) 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (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."
37. Applying the decision in *New World Stainless Steel Limited v Cosmas Mbaulu Munyasya* (2021) e KLR where it was stated:-

"Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting



them on notice that termination of their employment on this ground is being considered (see Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR and Dickson Matingi v Db Schenker Limited [2016] eKLR.”The court found no evidence was produced by the Respondent of any effort to reach the appellant with a view of putting him to notice of termination on the alleged ground of absconding.

38. Consequently, the Court at first appeal held that the Trial Magistrate Court erred in applying standard of prove of beyond the balance of probabilities and in the finding of fair termination when there was no compliance with section 41 of the *Employment Act* by the Respondent of putting the Appellant to notice of intention to terminate his employment on the basis of absconding. The termination is declared to have been unlawful and unfair.

Issue 2. Whether the Appellant was entitled to the reliefs sought.

39. The court at first appeal held that the termination was unlawful and unfair.
40. The appellant had sought for reliefs of sum of Kshs. 784 245 as itemized under paragraph 16 of the claim(page 5-6 of ROA)

On compensation

41. The appellant sought 12 months’ compensation. Under section 49(1) of the *Employment Act* compensation maximum of 12 months gross salary is one of the remedies.

The respondent’s submissions

42. The Respondent submitted that the Appellant having failed to sufficiently prove that he was absent from work because he was unwell, the court to hold that he did in fact abscond from duty and as such, the Respondent rightfully dismissed the Appellant from work. If anything, the Appellant’s act of absconding duty was him terminating the contract. However, in the unlikely event the court in its wisdom is of the opinion that the Claimant was unfairly terminated, the Court award the Claimant 3 months’ salary considering the number of years worked (the Claimant had worked from December 2013 – March 2019 which is 5 years and 3 months) guided by the following decisions:
- i. Wanyera v Central Isiolo Investment Limited (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment) – The Claimant had worked for 5 years and 6 months. The Appellate Court awarded him 3 months’ salary as compensation for wrongful termination.
 - ii. *Mulyanga v Zitron Limited (Cause 876 of 2018)* [2023] KEELRC 2400 (KLR) (9 October 2023) (Judgment) – The Claimant had worked for 6 years. The Court awarded him 3 months’ salary as compensation for wrongful termination.
 - iii. i Henry Shikoli Milimu v Hypermart Limited [2021] eKLR– The Claimant had worked for 6 years. The Court awarded him 2 months’ salary as compensation for wrongful termination.

Decision on compensation

43. The Court was guided to apply the criteria under section 49 (4) of the *Employment Act* to wit:- “4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;



- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement;
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- (e) the employee's length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;(k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

44. The Appellant was employed on 3rd December 2013 and dismissed vide letter dated 21st March 2019 which he received on the 16th May 2019 on resuming duty. The termination was held as unlawful and unfair. The appellant had no record of previous warnings. The Respondent relied on the decision in *Wanyera v Central Isiolo Investment Limited (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment)* – The Claimant had worked for 5 years and 6 months. The Appellate Court awarded him 3 months’ salary as compensation for wrongful termination. The court on perusal of the decision found in that case there was procedural hearing and the employee had received warning for alleged misconduct. The case is distinguished. In *Mulyanga v Zitron Limited (Cause 876 of 2018) [2023] KEELRC 2400 (KLR) (9 October 2023) (Judgment)* – The Claimant had worked for 6 years. The Court awarded him 3 months’ salary as compensation for wrongful termination. The court in the case found there was procedural fairness and the claimant did not appeal on the decision. The case is distinguished. In *Henry Shikoli Milimu v Hypermart Limited [2021] eKLR*– The Claimant had worked for 6 years. The Court awarded him 2 months’ salary as compensation for wrongful termination. In the case the court held the employee had contributed to the termination.

45. The Court taking into consideration the length of service, the fact that the reason for termination was not valid and the employee was not at fault, there was no notice or hearing before termination and fact that the claimant was a driver and there was no evidence of difficult in securing a suitable equivalent job, the court awards compensation equivalent of 10 months’ salary. Thus 970x30x10 months total award Kshs 291,000.

Notice pay in lieu

46. One-month notice pay is awarded for lack of procedural hearing for the sum of Kshs. 29100.



Untaken leave

47. The appellant stated he was engaged as a casual driver and was not afforded leave.
48. The respondent submitted that the Appellant had not provided any evidence that he did not proceed for leave and the Respondent testified that the Appellant did in fact proceed for leave.
49. Under section 74 of the *Employment Act* the employer had the burden to produce the record of leave of the employee. RW1 simply stated that the claimant used to go on leave but forms were not filled. The appellant did not state he applied for leave and was denied. The claim for leave in lieu is consequently limited to 18 months under section 28(4) of the *Employment Act* to wit:- “(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose” The award of leave in lieu is awarded for 18 months thus Kshs 30,555/-

House allowance

50. The Appellant stated house allowance was not paid and he was not issued with payslip. At trial RW1(Human Resources Officer) stated that they used to have payslips until the system broke down. They issued the appellant with a contract of service which he could not recall. On cross-examination, RW1 told the Trial Magistrate Court that staff were issued with accommodation unless they opted to stay elsewhere. In re-examination RW1 stated that the claimant was staying outside the staff premises.
51. The respondent submitted that it was the testimony of the Respondent that although the Respondent has housing arrangements for their employees, the Appellant opted to stay outside and the claim should be dismissed.
52. The court found that it was not disputed by the employer that the appellant was not afforded housing under section 31 of the *Employment Act*. The respondent did not produce any evidence on the housing of all staff whether via policy or contract of service. The Respondent had the burden to produce the record of employment under section 74 of the *Employment Act*. The court held that the Appellant’s claim for housing allowance was not controverted and the same was awarded at 15% of the basic salary for the period of employment. Total award on house allowance granted as stated in paragraph 16 of the claim for sum of Kshs. 226,980.

Service Pay

53. There was no evidence of NSSF thus service pay was due 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.” Service is awarded at 15 days for every year worked thus Kshs970 (per day)x15 days x5 years total sum Kshs. 72750

Conclusion

54. The appeal is allowed and the judgment and decree of Hon. B.M Cheloti-(SRM), delivered in the Chief Magistrate’s Court; CMELNO. E541 of 2022 on 5th May, 2023 is set aside and in place substituted as follows:-

Judgment is entered for the claimant against the respondent as follows-

A declaration that the summary dismissal was unlawful and unfair

Notice pay in lieu Kshs. 29,100

Compensation for the unlawful and unfair termination for the sum of Kshs. 291,000

Unpaid house allowance Kshs. 226,980

Untaken leave Kshs 30,555/-

Service pay Kshs. 72,750

(Sums payable subject of statutory deductions)

Costs of the suit and interest at court rate until payment in full.

55. Cost of the appeal to the Appellant.

56. Stay of 30 days.

57. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

IN The Presence Of:

Court Assistant: Otieno

Appellant: -Ms Owour h/b Gomba

Respondent: Ms Ndegwa h/b Awuor

