



**Munguti v Autopark International Limited (Appeal E055 of 2022)
[2025] KEELRC 411 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E055 OF 2022
SC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

ARON KYALO MUNGUTI APPELLANT

AND

AUTOPARK INTERNATIONAL LIMITED RESPONDENT

*(Being an appeal from the whole Judgment, Orders and Decree of the
Milimani Chief Magistrates Court (Hon. E.M Kagoni, P.M) delivered
at Nairobi on the 12th of April 2022 in CMEL No. 716 of 2019)*

JUDGMENT

1. The Appellant herein commenced a suit against the Respondent at the Chief Magistrate's Court at Nairobi being CMEL Cause No. 716 of 2019. It was the Appellant's case at the Trial Court that he was employed by the Respondent as a Winder-Tapeline Operator from 2nd May 2027 and that he served as such continuously and diligently to the satisfaction of the Respondent.
2. The Appellant further averred that he was paid a monthly salary of Kshs 23,000/= and was never provided with a housing facility or paid house allowance. He further averred that he used to work from 5:00 pm to 8:00 am and was never paid for the 7 extra hours at 1.5 rate being the overtime rate.
3. It was the Appellant's case that on 18th September 2018, he reported for work only to be turned away by the Human Resource Manager, Mr. Wachira under the instructions of Mr. Mwangi, the Director. The Appellant contended that there were no plausible reasons given to him upon inquiry and he was ordered out of the Respondent's premises.
4. According to the Appellant, the Respondent's action of informing him that his services were no longer required amounted to unlawful and unfair summary dismissal.



5. It was the Appellant's contention that he had done nothing wrong to warrant the dismissal and no notice was issued to him before the decision to summarily dismiss him was reached.
6. Against this background, the Appellant sought a declaratory order that his dismissal from the Respondent's service was unfair and unlawful. He further asked the Court to award him the sum of Kshs 405,230/= being one month's salary in lieu of notice, unpaid house allowance, unpaid overtime and compensatory damages for unfair and unlawful dismissal. The Appellant further sought an order for the issuance of a Certificate of Service as well as the costs of the suit.
7. The Respondent opposed the Claim through a Response dated 25th November 2019 in which it averred that it is a responsible employer and could not have terminated the Appellant in the circumstances pleaded.
8. According to the Respondent, the Appellant absconded duty and failed to report to work after advance payment. To this end, the Respondent termed the Appellant's assertions untruthful and outrageous.
9. The Respondent further averred that the Appellant took a fake document claiming he was injured at its premises. That upon investigation and follow-up calls, the document was found to be fake and the Appellant never returned to work.
10. It was the Respondent's case that the Appellant left on his own volition to work with a different employer severely compromising the work of the company.
11. With respect to the claim for overtime pay, the Respondent averred that the same was removed due to misuse and it is the company policy not to subject any worker to overtime or overtime pay. That to cover for overtime, salary was increased to Kshs 27,000/= at a flat rate all-inclusive.
12. In view of the foregoing, the Respondent asked the Court to dismiss the Appellant's claim with costs.
13. Alongside the Response, the Respondent filed a Counterclaim against the Appellant in the sum of Kshs 23,000/= on the basis that the Appellant left without any notice and in breach of his contract.
14. In rejoinder, the Appellant filed a Reply to Defence and Counterclaim. He reiterated the averments contained in the Memorandum of Claim and maintained that his salary was Kshs 23,000/=.
15. The Appellant further denied claims by the Respondent that he absconded duty and refused to report to work deliberately.
16. The Appellant further averred that he was treated at the Respondent's selected hospital where he had been taken by the Respondent's electrician Mr. Wangombe upon being authorized by Mr. Maundu, the Respondent's Production Manager. He further averred that the said Mr. Maundu gave out his car for him to be ferried to the hospital.
17. According to the Appellant, he was not aware of any complaints that the medical documents he had presented were fake and neither was he aware of any investigations on the same.
18. Disputing the Counterclaim by the Respondent, the Appellant denied absconding work and put the Respondent to strict proof thereof. He termed the Counterclaim a concoction of lies to cover up his unfair and unlawful dismissal.
19. At the trial Court, both parties were heard orally and their evidence was tested in cross-examination. In this regard, the Appellant testified in support of his case while the Respondent called oral evidence through Mr. Benson Wachira. Subsequent to the oral hearing, parties filed written submissions whereupon the trial Court evaluated and analyzed the evidence on record.



20. In the end, the trial Court entered judgment in favour of the Respondent thereby dismissing the Appellant's Claim with costs. In his judgment, the learned Magistrate found that the Appellant absconded duty. In so finding, the learned Magistrate observed that the Appellant habitually absconded duty after pay-day to drink and would return expecting no action. The Trial Magistrate further found that at no time was the Appellant turned away for absenteeism.

The Appeal

21. The Appellant being aggrieved by the findings and orders of the Trial Court has sought to challenge them on the following four (4) grounds listed in his Memorandum of Appeal:
1. The Learned Trial Magistrate erred in law and fact in finding and arriving at a judgment in favour of the Respondent against the weight of evidence and without material and substantive proof.
 2. The Learned Trial Magistrate erred in law and fact in finding that the Appellant had voluntarily left employment by absconding duty without basis and proof.
 3. The Learned Trial Magistrate erred in Law and fact and gave a Judgment which amounted to thanking, rewarding and enriching the Respondent for their willful, unlawful and unfair termination of the Appellant's employment.
 4. The Learned Trial Magistrate erred in Law and fact in failing to find that the Respondent had unfairly/unlawful terminated the Appellant from employment which entitled the Appellant to an Award of terminal dues and damages, interest and costs of the case as prayed for in the Memorandum of Claim.
22. Accordingly, the Appellant seeks the following orders from this Court:
1. That the Judgement Order and Decree of the Learned Trial Magistrate be set aside.
 2. That the court do assess and make a proper award of terminal dues and damages commensurate to the unlawful/unfair dismissal from employment suffered by the Claimant/Appellant plus cost and interest as prayed for in CMEL No. 716 of 2019.
 3. That the Respondent herein do equally bear the costs of this Appeal.

Submissions

23. The Appeal was canvassed by way of written submissions. At the time of writing this Judgment, the Respondent's submissions were missing from the Court's physical record and the online portal. This was despite the Respondent being granted leave by the Court on 16th January 2025 to file its submissions by close of business.
24. On his part, the Appellant submitted that the Respondent did not file any document to prove any attempts made to reach him other than mere allegations of sending colleagues to look for him. On this score, the Appellant argued that the Trial Magistrate's grounds for dismissing the Claim cannot be justified in law and fact. In support of this position, the Appellant invited the Court to consider the case of Joseph Nzioka vs Smart Coatings Limited (2017) eKLR.
25. In further support of his Appeal, the Appellant submitted that the trial court erred in failing to find that the Respondent had unlawfully /unfairly terminated him from employment. To this end, he referenced the case of International Planned Parenthood Federation vs Pamela Ebot Arrey Effiom [2016] eKLR and Kenfreight EA Ltd vs Benson K. Nguti [2016] eKLR.



26. It was further submitted by the Appellant that the Trial Court's findings were based on a complete misdirection of the evidence tendered. That further, the magistrate relied on a wrong principle in reaching the finding that the suit be dismissed.

Analysis and Determination

27. This being the first appellate Court, it is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent determination on whether or not to allow the appeal. The Court is further empowered to subject the entire evidence to fresh scrutiny and draw its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. Such was the determination in *Selle & another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123.
28. In line with the above precedent, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion, bearing in mind that I did not see or hear the witnesses as they testified.
29. Having reviewed the record before Court, the Appellant's submissions, as well as the law applicable, the following issues stand out for determination: -
- a. Whether the Trial Court erred in finding that the Appellant absconded duty and that he was not unfairly terminated from employment;
 - b. Whether the Appellant is entitled to the reliefs sought at the Trial Court.

Abscondment of duty or unfair termination?

30. From the record, both parties presented different versions as to the manner in which the employment relationship was severed. While the Appellant averred that he reported to work on 18th September 2018 and was turned away by the Respondent's Human Resource Manager, the Respondent contended that the Appellant absconded duty and failed to report back to work after an advance payment.
31. At the Trial Court, the Respondent's witness, Mr. Benson Wachira stated that the Appellant had developed a habit of absenting himself after payday and that he would go and drink only to return after a number of days expecting no action. According to Mr. Wachira, several verbal reprimands had been given to the Appellant to no avail.
32. What is notable is that the Respondent did not lead any evidence at the trial Court to prove its assertions that the Appellant had absconded duty as claimed. In this regard, I cannot help but question why the Respondent failed to produce relevant work attendance records/muster roll to prove that indeed, the Appellant absconded work on the days it alleges he did. I say so bearing in mind that the Respondent is the custodian of employment records under Section 74 of the *Employment Act*.
33. Further to the assertions that the Appellant absconded duty, Mr. Wachira stated that he tried to reach the Appellant through his contacts and work colleagues but all channels of communication were closed.
34. Be that as it may, there was no evidence to back up Mr. Wachira's assertions. Indeed, in its Judgment, the Trial Court noted that there was no physical evidence from the Respondent's end of the efforts made to contact the Appellant. In this regard, the Trial Court opted to solely rely on Mr. Wachira's oral evidence that he had tried to contact the Appellant through his colleagues.



35. It has been held times without number that where an employee fails to report to work without any lawful cause or permission, it is expected that an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence. This was not evident in this case.
36. It is also notable from the record that the Respondent did not disclose any action it took upon noting the Appellant's abscondment of duty. This is bearing in mind Mr. Wachira's assertions that the Appellant was a habitual absentee who would go drinking after payday. Indeed, if the Respondent's version is to be believed, it is rather odd that the Respondent chose to entertain the Appellant's conduct without taking any disciplinary measures against him. Respectfully, I find this implausible.
37. What's more, absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the *Employment Act*.
38. Hence, if indeed the Appellant had absconded duty habitually as claimed by the Respondent, one wonders why the Respondent failed to take disciplinary action against him as permitted under Section 44 (4) (a) of the *Employment Act*. Why didn't the Respondent put the Appellant on notice that his employment was bound to be terminated if he failed to show cause for absconding duty?
39. Needless to say, it was not sufficient for the Respondent to allege that the Appellant had absconded duty without proving the said absence and or demonstrating the steps it had undertaken to ascertain his whereabouts and put him on notice to explain his absence from work.
40. Having failed to prove the foregoing elements, I cannot help but conclude that it is more than probable that the Appellant was asked to leave employment.
41. All things considered, this Court finds that the Respondent failed to prove at the Trial Court that the Appellant absconded duty and that it made efforts to establish his whereabouts. To that end, the learned trial Magistrate fell into error in concluding that the Appellant absconded duty. Such a finding was without any basis.
42. As it is, the Respondent's case was hinged on the claim that the Appellant absconded duty. Even so, it was bound to follow due process under the *Employment Act*. As stated herein, absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the *Employment Act*.
43. Therefore, in the event the Appellant had indeed, absconded duty, the Respondent was enjoined to accord him a fair hearing and subject him to the process contemplated under Section 41 of the *Employment Act*.
44. In this case, the Respondent did not indicate let alone suggest that it took the Appellant through a disciplinary process prior to letting him go. Indeed, and contrary to what the Respondent appears to be suggesting, an employment relationship does not automatically come to an end. There are procedural steps taken towards that end.
45. The total sum of my consideration is that the Respondent terminated the Appellant's employment unfairly.

Reliefs?

46. At the outset, it is notable that the Appellant has not challenged the Trial Court's decision not to award him house allowance and overtime pay. As such, I take it that the only outstanding relief is notice pay and compensatory damages for unfair termination.



47. As the Court has found that the Appellant was unfairly terminated from employment, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to five (5) months of his gross salary. This award has considered the length of the employment relationship as well as the circumstances leading to the termination.

Orders

48. In the final analysis, the Appeal is allowed as follows: -

- a. The Trial Court's order dismissing the Appellant's suit is hereby set aside.
- b. The Appellant is awarded the sum of Kshs 23,000.00 being one month's salary in lieu of notice.
- c. The Appellant is awarded compensatory damages in the sum of Kshs 115,000.00 being equivalent to five (5) months of his salary.
- d. The total award is Kshs 138,000.00
- e. Interest on the amount in (d) at court rates from the date of this Judgment until payment in full.

49. As the Appeal has succeeded, costs in this Court and at the Trial Court shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant Ms. Amemba instructed by Mr. Namada

For the Respondent Ms. Rinya Kibiti instructed by Mr. Okemwa

Court Assistant Kemboi

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

