



REPUBLIC OF KENYA



**KENYA LAW**  
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**ISL Kenya Limited v Nzau (Employment and Labour Relations Appeal  
2 of 2020) [2025] KEELRC 904 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 904 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 2 OF 2020  
MA ONYANGO, J  
MARCH 21, 2025**

**BETWEEN**

**ISL KENYA LIMITED ..... APPELLANT**

**AND**

**JAMES KIOKO NZAU ..... RESPONDENT**

*(Being an appeal from the judgment of the Chief Magistrates Court at Mavoko  
by Hon. B. Kasavuli, Principal Magistrate delivered on the 16th November,  
2020 in ELRC No. 21 of 2018 James Kioko Nzau v ISL Kenya Limited)*

**JUDGMENT**

1. The Appellant herein was sued by the Respondent in the trial court vide Memorandum of Claim dated 30<sup>th</sup> November, 2018 in which the Claimant, now the Respondent, sought compensation for alleged unlawful and unfair dismissal by the Appellant. In the judgement delivered on 22<sup>nd</sup> February, 2021 the court found in favour of the Respondent and awarded him Kshs. 269,893.26 as payment for terminal dues and damages, costs and interest.
2. The Appellant, being aggrieved by the said decision, has appealed to this court against the entire judgement and decree on the following grounds as raised in its Memorandum of Appeal:
  - 4.1 That the Honourable Magistrate erred in law and fact when he held that the Respondent was a Cutting Machine Operator and not a casual worker;
  - 4.2 That the Honourable Magistrate erred in law and fact when he failed to appreciate and hold that the Respondent. used to attend work based on the availability of production materials and was therefore not a permanent employee;



- 4.3 That the Honourable Magistrate erred in law and fact when failed to appreciate and hold that Respondent absconded duty from 23/02/2017 and therefore could not have been unlawfully and unfairly terminated;
- 4.4 That the Honourable Magistrate erred in law and fact when he held that the Respondent is entitled to one month's salary in lieu of notice.
- 4.5. That the Honourable Magistrate erred in law and fact when he held that the Appellant did not adduce evidence to show that the Respondent was not invited to any decision making proceeding or any letter was sent to him indicating that he had absconded duty;
- 4.6 That the Honourable Magistrate erred in law and fact when he held that the Appellant's response to the Respondent's demand letter shows that the Appellant had paid the Respondent's dues and that the Appellant complied with law before terminating the Respondent's services;
- 4.7 That the Honourable Magistrate erred in law and fact when he held that the Appellant had terminated the Respondent's employment unfairly and unlawfully;
- 4.8 That the Honourable Magistrate erred in law and fact when he held that the Appellant did not produce evidence to justify payment in lieu of leave;
- 4.9 That the Honourable Magistrate erred in law and fact when he held that the Appellant did not adduce evidence to dispel the Claimant's claim that he worked on 11 Public Holidays;
- 4.10. That the Honourable Magistrate erred in law and fact when he held that there was underpayment of the Respondent.
- 4.11. That the Honourable Magistrate erred in law and fact when he failed to consider the Appellant's submission;
- 4.12 That the Honourable Magistrate erred in law and fact when he failed to appreciate the principles that govern the termination of employment relationships between employers and employees; and
- 4.13. That the Honourable Magistrate erred in law and fact in ordering the Appellant to pay the Respondent's terminal benefit as follows:
  - i. One months salary in lieu of notice Ksh. 30,033.90/=
  - ii. Annual leave for two years worked Ksh. 42,047.46/=
  - iii. 11 Public Holidays worked Ksh. 22,024.86/=
  - iv. underpayment Ksh. 175,787.04/=
  - TOTAL Ksh.269,893.26/=
  - v. Appellant to issue the Respondent with certificate of service

3. The Appellant seeks the following orders: -

- i. That this appeal be allowed;
- ii. That the judgment delivered by Honourable Bernard Kasavuli, PM on 22/02/2021 and issued in Mavoko MC ELRC Cause 21 of 2018 – James Kioko Nzau v ISL Kenya Limited be set aside;



- iii. That the Respondent be directed to pay for the costs of this appeal and Mavoko MC ELRC Cause 21 of 2018- James Kioko Nzau v ISL Kenya Limited.

### **Background of the case**

4. The Respondent herein was an employee of the Appellant. According to his Memorandum of Claim, the Respondent was employed by the Appellant 2<sup>nd</sup> February, 2015 as a cutting Machine operator at a weekly salary of Kshs. 5240.64 translating to Kshs. 22,709.44 per month.
5. On or about 23<sup>rd</sup> February, 2017 the Appellant summarily terminated the Respondent's employment without reasonable cause and without following proper legal procedures. The Respondent averred that in dismissing him the Appellant breached mandatory provisions of the labour laws, principles of natural justice and the constitutional right to fair labour practices.
6. The Respondent averred that no notice of termination was issued to him; no hearing ever took place before the decision to summarily dismiss the Respondent; due process was thrown out of the window in the haste to summarily dismiss him; and, the Respondent had no opportunity to appeal against the decision to dismiss him.
7. The Respondent averred that he worked for the Appellant for about two years without blemish yet the Appellant did not give him any employment contract. That the Appellant did not fully pay the Respondent's monthly National Social Security Fund contributions. The Appellant failed to pay the Respondent his terminal benefits and compensatory damages.
8. The Respondent particularized his benefits and terminal dues as hereunder:
  - i. One month salary in lieu of = 30,033.90/=
  - ii. Annual leave for two years worked = Ksh.42,047.46/=
  - iii. Public holidays for two years worked = Ksh.22,024,86/=
  - iv. Service gratuity for two years worked =34,654/=
  - v. Underpayment 655.80 + 499.35 = Kshs. 1,155.15
  - vi. Amount which the Claimant was to be paid as a Cutting Machine Operator as payment per day 1,155.15 – 873.44 = 281.71 x 26 x 24 months = Ksh.175,787.04/=.
9. The Respondent further prayed for compensation of Kshs. 30,033.90x12 months = Kshs. 360,406.80
10. He prayed for a declaration that his dismissal from employment was unlawful and unfair and he is entitled to payment of terminal dues and compensatory damages, an order for payment of Kshs. 664,954.56 and an order for the Appellant to pay the costs and interest.
11. In his witness statement filed with the Memorandum of Claim the Respondent stated that he was employed by the Appellant on or about 2<sup>nd</sup> February, 2015 as a Cutting Machine Operator in the Appellant's factory; worked six days a week from 7.00 am to 7.00 pm which constituted 8 working hours and four overtime work hours; he was paid Kshs. 5,240 at the end of every week as weekly earnings amounting to a gross salary of Kshs. 22,709.44 per month. That on 23<sup>rd</sup> February, 2017 the Respondent summarily terminated his employment. He was not given notice of dismissal or payment in lieu, he was not given a hearing or an opportunity to appeal against the decision to terminate his employment, no reason was given to him for the termination and the Appellant failed to issue to him a certificate of service to him.



12. The Appellant filed a Statement of Defence in which it denied that it employed the Respondent as a machine operator. It pleaded that the Respondent abandoned work after 23<sup>rd</sup> December, 2016 and was not heard of until the Respondent served it with summons in this suit. In the alternative, the Appellant pleaded that if the Respondent's employment was terminated, due process was complied with. It denied all other averments in the Memorandum of Claim.
13. At the hearing the Respondent adopted his witness statement and produced his documents as filed. He testified that his work was stopped due to shortage of raw materials. That when work resumed he was told that he and others had been fired. Under cross examination he stated that he was a machine cutter, that he was never given any leave days and that he was never issued with certificate of service.
14. The Appellant called John Frederick Okello, its Human Resources Manager who testified that the Respondent was engaged by the Appellant as a casual labourer in 2015. That his work depended on supply of raw materials and production. That on 23<sup>rd</sup> February, 2017 the Respondent was at work for the whole day as shown in wage sheet filed by the Appellant. That after that date the Respondent never showed up and was replaced with another casual labourer at the gate.
15. He testified that the Appellant paid for leave at the end of the year and the Respondent was paid. That the Respondent's wage was Kshs. 484 per day for 8 hours. He testified that the Respondent did not work on public holidays as a casual worker.
16. He testified that the Respondent was not issued with a certificate of service because he did not inform the Appellant that he was leaving work. That the Supervisor had no authority to dismiss an employee.
17. In cross examination RW1 admitted that there were months when NSSF was not remitted for the Respondent. He denied that the Appellant did not allow the Respondent to rest. He stated that the Respondent was not a machine operator but he did not have evidence to show that someone else operated the machine used by the Respondent. He reiterated that the Respondent absconded work and was replaced the following day.

## **The Appeal**

18. The appeal was disposed of by way of written submissions. Only the Appellant's submissions are in the court file. Although the Appellant raised 13 grounds of appeal, in the submissions it identified the issues for determination to be the following: -
  - i. Whether the Honourable Magistrate erred in law and in fact when he held that the Appellant terminated the Respondent's employment unlawfully and unfairly;
  - ii. Whether the Honourable Magistrate erred in law and in fact in ordering the Appellant to pay the Respondent's terminal benefits amounting to Kshs. 269,893.26 plus costs and interest.
19. On the first issue the Appellant relied on the decision in *Boniface Nkubi Karagania v Protective Custody Limited* [2019] eKLR wherein the case of *SABC v CCMA and others* (200) 8 BLLR 693 (LAC) was cited in which the court held that "It is not desertion when an employee who is absent from work intends to work. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in fair process."
20. The Appellant further relied on the case of *SACWU v DYASI* (2007) 7D LLR 731 (LAL) the court held that "Desertion on the other hand, requires an employer to infer an intention on the part of the employees, as a result of such employee's conduct, that the employee has no intention to return to work."



21. The Appellant also relied on the decision in *James Kiprof Tarus v Riley Falcon Security Services Ltd* [2017] eKLR where the court held “This is because her case and evidence demonstrate a clear case of absconding duty by the respondent. This amounted to gross misconduct on his part, resulting in dismissal from service. The claimant does not come out of his way to rebut this overwhelming case of misconduct as enunciated by the respondent. Instead, he elaborately cites a case of violation of the *Employment Act* and unlawful termination which he fails to establish and illustrate in evidence. I therefore find a case of lawful termination of employment and hold as such.
22. On the second issue the Appellant submitted that Mr. Okello testified that no work was done during public holidays as the Appellant company was closed. That the Honourable Magistrate therefore erred in law and fact in awarding the Respondent overtime worked on public holidays.
23. It was further submitted that the Honourable Magistrate also erred in law and fact in awarding leave pay yet the Respondent did not adduce any evidence to support the same. That Mr. Okello testified that leave days was paid at the end of the year. The Appellant relied on *Patrick Mutinda Mutuku v Ashut Engineering Ltd* [2016] eKLR where it was held that where the court was satisfied that the Claimant was paid in lieu of untaken leave days any subsequent claim in relation to payment in lieu of untaken leave days has no merit and should be dismissed.
24. The Appellant further relied on the decision in *Reef Hotel Limited v Josephine Chivatsi* [2021] eKLR in which the court stated that an employee claiming compensation for working on public holidays is required to adduce evidence as to what particular holidays they worked as affirmed in the cited case of *Rogoli Ole Manadiegi v General Cargo Services Limited* [2016] eKLR in the following words:

“It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days...he did not justify the global figure claimed in overtime showing specifically how it was arrived at ...”
25. Further, the Appellant relied on the case of *Geoffrey Wabwire Henry v Auto Hauliers [K] Limited* [2019] eKLR where the honourable court stated that there should be some evidence to show that the Appellant was open for business on public holidays and that there is evidence of actual work done on the Respondent’s part. The Honourable judge further stated that;

“There ought to be some evidence in form of attendance register, or oral evidence from a Colleague of the Claimant, showing that the Claimant worked on Public Holidays. It is not sufficient to ask the Court to take notice of the number of Public Holidays in the year, and make an assumption that the Claimant worked during those days.”
26. It was further submitted that the Honourable court erred in law and fact in failing to take into account the relevant considerations in awarding terminal benefits amounting to Kshs. 269,893.26 plus costs and interest. The Appellant relied on the decision in *OI Pajeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR where the Court of Appeal held that the trial court erred in awarding maximum compensation in the absence of any reason justifying the awarding of the same.
27. In conclusion the Appellant submitted that the appeal should be allowed based on the foregoing:



- i. That the Honourable Magistrate erred in law and fact when he held that the Appellant terminated the Respondent's employment unlawfully and unfairly;
- ii. That the Honourable Magistrate erred in law and fact when he ordered the Appellant to pay the Respondent's terminal dues and damages totalling to Kshs. 269,893.26/ = plus costs and interest.
- iii. That the Honourable Magistrate erred in law and fact when he failed to consider the Appellant's submissions;
- iv. That the Honourable Magistrate erred in law and fact when he failed to appreciate the principles that govern the termination of employment relationships between employers and employees.

### **Analysis and Determination**

28. As the first appellate court I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own decision in the matter. I must however exercise caution since I do not have the advantage of having seen and heard the witnesses. See *Selle & another –vs- Associated Motor Boat Co. Ltd & others* [1968] EA 123.
29. I have carefully reconsidered and evaluated the evidence on record. I have also considered the written submissions by the rival parties in this Appellant. In my view, the issues for determination are
  - i. Whether the Respondent was a casual employee of the Appellant;
  - ii. Whether the Respondent proved that he was unfairly dismissed from employment by the Appellant; and
  - iii. If the award by the Honourable Magistrate was excessive or based on wrong or irrelevant considerations as to require interference by this court.
30. It is not disputed that the Respondent was employed by the Appellant in 2015 and that he was last at work on 23<sup>rd</sup> February, 2017. The Respondent averred that he started working for the Appellant on or about 2<sup>nd</sup> February, 2015 while according to the Appellant's witness the Respondent was first employed in July, 2015. Be that as it may, the Respondent worked for the Appellant continuously for more than one year.
31. Section 2 of the *Employment Act* defines a casual employee as:
 

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;”
32. Further, section 37 of the Act provides for conversion of casual employment to term contract as follows:
  37. Conversion of causal employment to term contract
    - (1) Notwithstanding any provisions of this Act, where a casual employee—
      - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or



- (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
- (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
33. From the foregoing, it is clear that the Respondent was no longer a casual employee having worked continuously for more than a year.
34. On the second issue, the Respondent having not been a casual employee, the Appellant was under obligation to treat the termination of his employment as a regular employee.
35. As has been held in many decisions relating to desertion of duty, an employer is under obligation to inquire as to the whereabouts of an employee who fails to report on duty for purposes of determining whether or not such employee should be dismissed from work for absconding duty.
36. In *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the Court held that: -
- “10. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).”
37. In the case of *Richard Maingi vs Wells Fargo Limited* [2017] eKLR and *Chispine Onguso Okinyi vs Devki Steel Mills Limited* [2018] eKLR the court held that dismissal on account of desertion requires the employer to produce evidence showing reasonable steps were taken to contact the employee accused of desertion.



38. In the case of Albanus Mbuithi *Mutiso v Fresh Breeze Limited Cause No.851 of 2017* the court held that where the employer alleges that the employee has absconded duty, the employer must demonstrate what steps were taken to bring the employee to account.
39. In the instant case it is not disputed that the Respondent was last at work on 23<sup>rd</sup> February, 2017. According to him, the employees were stopped from working due to shortage of raw materials. That when he reported back for duty after raw materials became available he and other employees were told that they had been fired.
40. The Respondent's evidence was corroborated by the Appellants witness Mr. Okello when he testified that "The Claimant's work depended on supply of raw materials and production."
41. Mr. Okello further testified that the Respondent was replaced the following day after he absconded duty. That he last worked on 23<sup>rd</sup> February, 2017. He further testified that the Appellant did not find out where the Claimant was.
42. From the foregoing it is clear that whether the Claimant is the one who left work on his own or it was because of shortage of raw materials, the Appellant did not make any inquiries to establish why he was not at work and therefore had no evidence that he had absconded work to warrant his replacement as per evidence of Mr. Okello.
43. I therefore find that the Respondent unfairly terminated the employment of the Respondent.
44. On the final issue whether the awards to the Respondent were justified, the Respondent was awarded Kshs. 269,893.26 made up of one months' salary in lieu of notice, Kshs. 42,047 in lieu of annual leave Kshs. 30,033.90 for work on public holidays and Kshs. 175,787.04 for underpayments.
45. An appellate court would only be justified to interfere with the lower court's award if it was satisfied that in arriving at the award, the learned trial magistrate applied wrong legal principles or considered irrelevant factors or failed to take into account relevant ones. The court would also be entitled to intervene if the award was either inordinately low or high as to lead to an inference that it was an erroneous estimate of the damage secured. See: Catholic Diocese of Kisumu v Tete [2004] eKLR; Douglas Kalafa Ombeva v David Ngama [2023] eKLR.
46. The Appellant did not submit on pay in lieu of notice. It is thus my view that the same is not contested.
47. On the award for annual leave the Appellant's allegation that it paid for leave every year is not supported by any evidence. The position taken by the Appellant that the Respondent did not adduce any evidence on the same beats logic. The Respondent's position being that he never went on leave, what evidence would he be submitting?
48. On the other hand if the Appellant paid in lieu of leave it should have records for the payment. That is the essence of section 10(6) and (7) which provide:
- 10(6). The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
- 10(7). If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
49. One of the particulars of records that an employer is required to keep under section 10(1)(3) is:
- (3) The statement required under this section shall also contain particulars ... of—



- (a) any terms and conditions relating to any of the following—
  - (i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

50. This position is supported by sections 107-109 of the *Evidence Act* which provide –

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.

- 51. For these reasons I find no reason to interfere with the award of the trial court on this head.
- 52. The same reasons would apply to the award in respect of public holidays.
- 53. For the foregoing reasons I find no merit in the Appeal. The upshot is that appeal is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON**

**THIS 21<sup>ST</sup> DAY OF MARCH, 2025**

**MAUREEN ONYANGO**

**JUDGE**

