



REPUBLIC OF KENYA



**Ng'ang'a v Avic International Holding Corporation (Employment and Labour Relations Appeal E150 of 2024) [2025] KEELRC 858 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 858 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E150 OF 2024**

**JW KELI, J  
MARCH 14, 2025**

**BETWEEN**

**JOHN KINYANJUI NG'ANG'A ..... APPELLANT**

**AND**

**AVIC INTERNATIONAL HOLDING CORPORATION ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable D.N Musyoka (CM) delivered at Nairobi on the 24th April, 2024 in Gatundu MCELRC E002 of 2021)*

**JUDGMENT**

1. The Appellant, dissatisfied with the Judgment and Orders of the Honourable D.N Musyoka (CM) delivered at Gatundu on the 24<sup>th</sup> April, 2024 in Gatundu MCELRC No. E002 of 2021 between the parties filed a Memorandum of Appeal dated 22<sup>nd</sup> May, 2024 seeking the following orders:
  - i. The Judgment of the lower Court be set aside;
  - ii. That Judgment be entered affirming that the Appellant's dismissal was unlawful and unfair;
  - iii. This Honourable Court grants Judgment to the Appellant as prayed in the Statement of Claim in the lower Court;
  - iv. This Honourable Court makes such orders as may be in the interest of justice; and
  - v. The Appellant be awarded costs of this Court and that of the lower Court

**The Grounds of the Appeal**

2. That the learned Magistrate erred in fact and law and misapprehended the respective parties' evidence thereby misguidedly reaching the conclusion that the Appellant had absconded duty;



3. The learned Magistrate erred in fact when he disregarded the glaring inconsistencies and fabrications in the Respondent's evidence and pleadings pertaining whether the Appellant absconded duty or was sent on unpaid leave thereby reaching an unjust decision;
4. That the learned Magistrate erred in law and in fact by disregarding the Appellant's evidence that the allegations against him were trumped up and that the truth was that he was exposed to discriminatory and illegal conduct by the Respondent for attempting to exercise his labour rights;
5. The Learned Magistrate erred in fact and law when he reached the decision that the Respondent had a valid reason to dismiss the appellant from employment;
6. That the learned Magistrate erred in law and fact when he concluded that the Respondent dismissed the Appellant for misconduct yet failed to address himself on the unfairness in the procedure used to dismiss him;
7. That the learned Magistrate erred in law and in fact by finding that the termination of the Appellant was lawful contrary to the evidence presented before the Court;
8. The learned Magistrate depended on hearsay evidence of the Respondent's witness in reaching his decision.
9. That the learned Magistrate grossly misdirected himself by inferring evidence on the part of the Respondent, disregarding the Appellant's evidence and submissions thereby reaching the wrong determination on the claim;
10. That the learned Magistrate erred in law and occasioned a great miscarriage of justice when he misdirected himself as to the issues for determination by failing to address himself on all the other claims and prayers made by the Appellant under the Statement of claim which led to him reaching the wrong conclusion on the claims in the cause; and
11. That the learned Magistrate erred in law by dismissing the Appellant's case in utter disregard to the employment and labour rights of the Appellant.

### **Background to the Appeal**

12. The Claimant/Appellant filed claim against the Respondent vide an Amended Statement of Claim dated 29<sup>th</sup> October, 2021 seeking the following orders:-
  - A. an order be and is hereby issued that the decision by the Respondent to unilaterally vary the Claimant's terms of service of the Claimant by sending him on unpaid leave be and is hereby declared unlawful;
  - B. That a permanent injunction be and is hereby issued restraining the Respondent, its directors, agents and or servants from unilaterally varying the Claimant's terms of service;
  - C. That a permanent injunction be and is hereby issued restraining the Respondent, its directors, agents and or servants from having the Claimant proceed on unpaid leave;
  - D. That a mandatory injunction be and is hereby issued to the Respondent, its directors, agents and or servants reinstating the Claimant to his position without loss of benefits including back salary;
  - E. An order be and is hereby issued that the conduct by the Respondent amounts to constructive dismissal from his employment;



- F. In alternative to (b) to (e) above, an order be and is hereby issued that the decision by the Respondent to have the Claimant proceed on indefinite unpaid leave is unfair and the attempts to demote him amounts to constructive and/or unfair and unlawful termination of employment;
  - G. In alternative to (b) to (e) above an order be and is hereby issued that the treatment of the Claimant by the Respondent and his summary dismissal amounts to unfair and unlawful termination of employment.
  - H. 12 months compensation for constructive, unfair dismissal and/or unlawful termination of employment;
  - I. That the Respondent be and is hereby ordered to pay all salary, allowances including housing allowance and the benefits accruing and relating to the month of January, 2021 and all following months until the determination of this suit;
  - J. Damages for the Respondent's breach of the Claimant's rights as enshrined under articles 41 and 47 of *the Constitution* of Kenya, 2020;
  - K. Wages for the holidays that the Claimant worked at double the applicable daily rates;
  - L. Wages for the holidays that the Respondent did not remunerate the Claimant at the applicable daily rates;
  - M. Wages for the days within the year 2020 when the Respondent stopped the Claimant from reporting to work;
  - N. Wages for the days spent by the Claimant attending to the repair and other maintenance needs of a trailer and other official duties of the Respondent;
  - O. Housing -allowance from August, 2020 to 15th January, 2021 calculated at 20% of the wages earned by the Claimant;  
Wages from March, 2020 to June, 2020 both months inclusive together with housing allowance;
  - Q. 26 days' pay in lieu of leave;
  - R. Costs of this Claim;
  - S. Interest on (g) to (q) (both inclusive) above at court rates.
13. The Claimant filed his verifying affidavit, witness statement and list of documents all dated 29<sup>th</sup> March, 2021 together with the bundle of documents (see pages 21-29 of ROA).
  14. The claim was opposed by the Respondent who entered appearance and filed a Response to the Statement of Claim dated 24<sup>th</sup> May, 2021 (Pages 37-40 of ROA), Respondent's list of witnesses, Respondent's Witness Statement of Bai Haitao and list and bundle of documents all of even date (Pages 41-56 of ROA).
  15. The Claimant Amended its Statement of Claim dated 29<sup>th</sup> October, 2021(Pages 116-121 of ROA).
  16. The Respondent filed an Amended List of Witnesses dated 11<sup>th</sup> May, 2023 together with the Witness Statement of Mr. Luta Mercelinus Mukhomah of even date (Pages 124-126 of ROA).



17. The claimant's case was heard on the 9<sup>th</sup> of November 2022 where the claimant testified on oath in the case, produced his documents, and was cross-examined by counsel for the Respondent Mrs. Fundi (pages 177-180 of ROA).
18. The Respondent's case was heard on the 20<sup>th</sup> of September, 2023 where DW1 Mr. Luta Mercelinus Mukhomah testified on behalf of the Respondent. He relied on his filed witness statement. He was cross-examined by counsel for the claimant Ms. Kimani(pages 182-184 of ROA).
19. The parties took directions on filing of written submissions after the hearing. The parties complied.
20. The Trial Magistrate Court delivered its Judgment on the 24<sup>th</sup> April, 2024 dismissing the Claimant's claim with costs. (Judgment at pages 158-165 of ROA).
21. 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."
22. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

### **Issues for determination**

23. Both the Appellant and the Respondent submitted the following issues for the court's determination namely:-
  - a. Whether the honourable trial magistrate erred in finding that the Respondent had a valid reason to dismiss the Appellant from employment;
  - b. Whether the honourable trial magistrate erred in relation to the fairness of the procedure adopted by the Respondent to dismiss the Appellant from employment.
  - c. Whether the honourable trial magistrate properly addressed himself to the prayers made by the Appellant in the Statement of Claim; and
  - d. What relief the appellant is entitled to.
24. The Court on perusal of the appeal and submissions was of the parties was of the considered opinion that the issues for determination in the appeal were:
  - a. Whether the trial court erred in its finding on the fairness of the termination.
  - b. Whether the appellant was entitled to reliefs sought.



## Whether the trial court erred in its finding on the fairness of the termination

25. The threshold for fair termination of employment against which the Court determines claims for unfair termination is according to the provision of section 45(2) of the Employment Act to wit:-
- “45. Unfair termination
- (1) No employer shall terminate the employment of an employee unfairly.
  - (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.”

26. Fairness as per section 45(2) (supra) has two components, of substantive fairness of valid reasons related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer and of procedural fairness under section 41 of the Act.

27. The evidence of fair termination of employment is proved according to 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.”

28. The trial court held that the Appellant absconded duty for 15 days and was subjected to procedural fairness vide the show cause letter dated 25<sup>th</sup> January 2021 which he failed to respond to. The role of the court at this stage of first appeal is to re-evaluate the evidence before the trial court and reach its own conclusion (Selle v Associated Motor Boat Co. [1968] EA 123)

29. The Appellant during cross-examination told the court that he was employed on 3/1/202 as trailer driver. Initially he helped other workers with cement mixing as he awaited his trailer to come. In August 2020 he signed contract, and was given a vehicle (Trailer). They signed a book kept by one Mr. Pen which showed the date he reported to work, and the money given for fuel. He worked up to 15.01.2021 and was told to leave the motor vehicle (Trailer). He could not tell whether he was demoted but the employer took the 22-wheel vehicle and gave him 10 10-wheel truck tippers which he had no experience driving. He had no issue with payment. He was not given any warning or notice to show cause. He left work on 15<sup>th</sup> January 2021 when he was to go home and would be called back. He was called to report on 20/01/2021 and told to drive another motor vehicle which he had no experience on. He told Ian and was given a job cancellation. Mr. Pen called him again to come sign payroll on 27/01/2021. He then went home. He texted Pen on his work and was told to wait for his motor vehicle. (pages 178 to 180 of ROA).

## Response

30. The respondent told the trial court that the appellant absconded duty. He was selling company material and tyres. He was given Warnings. He was given show-cause letter. He did not sign. He was to sign first as employee and having failed to do so the employer did also not sign the warning letters. Re—



assignment of the Claimant's job was done after meeting employee. The Claimant was called for show cause letter but did not come. He absconded for a long time.(pages 183-184 of ROA).

## Decision

31. The Respondent alleged absconding duty and relied on a letter dated 25<sup>th</sup> January 2021. It stated Claimant was absent after the issuance of a letter dated 10<sup>th</sup> January 2021. The Claimant denied receipt of the letter dated 25<sup>th</sup> January 2021 and no evidence was produced of service of letter on Claimant (page 81 of ROA).
32. The Respondent's witness statement of Luta Mercelinus Mukhomah dated 11<sup>th</sup> May 2023 stated that the Claimant was issued with a warning letter of underperformance (page 80 of ROA). The court noted that the alleged letter had a space for the employee to sign. The letter was not signed by anyone. RW1 stated that since Claimant refused to sign, employer did not sign. At trial the Claimant knew of content of letter re-assigning him from Truck driver to tipper driver. RW1 further stated that the re-assignment was effective 15<sup>th</sup> January 2021. RW1 stated that the Claimant absconded from 16<sup>th</sup> January 2021 and on 25<sup>th</sup> January 2021 was issued with a show cause letter for absenteeism (page 81).The Claimant did not respond hence was dismissed. RW1 stated at cross-examination that they gave Claimant the letter for show cause to sign and he did not sign. The Claimant produced letter dated 20<sup>th</sup> January 2021 titled Reasons for job cancellation. The reasons were related to his role of team leader. He was accused of failing to take care of the vehicles leading to company loss. That as team captain the vehicle management was not in place. The court did not find any other dismissal letter.
33. The court perused the defence pleadings and did not find denial of letter dated 20<sup>th</sup> January 2021. (page 101 of ROA). At cross-examination the Claimant told the trial court he was caused to pick the job cancellation letter. The court for the foregoing finds that contrary to finding of reason of absconding by trial court, the letter of absconding was issued on 25<sup>th</sup> January 2021 post the job cancellation of 20<sup>th</sup> January 2021. An employer cannot subject an ex-employee to a disciplinary process. In the case of Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR it was held that an employer has no jurisdiction over his employee once he resigns and fortified its finding by decision of the Labour Court of South Africa, in Mtati v. KPMG (Pty) Ltd (2017) BLL 315 (LC) where the Court held; - "where an Employee tenders resignation immediately, the Employer is immediately deprived of jurisdiction to continue with the disciplinary process. Resignation takes effect immediately. Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority"
34. The court found that the reason for the termination was as per the reason stated on 20<sup>th</sup> January 2021 on job cancellation. The Claimant was not given a notice to show cause on the said reasons and they were unsubstantiated as no documentary evidence was attached. The court found that the said reasons were below the threshold of section 43 of *Employment Act*. The said reasons were not the reasons advanced at defence. At defence the reason was absconding. The court found that the show cause was issued on 25<sup>th</sup> January 2021 (page 81 ROA) while the job was cancelled on 20<sup>th</sup> January 2021. There was not proof of further dismissal letter post one of job cancellation of 20<sup>th</sup> January 2021. On a balance of probabilities, the court on the first appeal found that the Respondent did not discharge the burden to prove valid reasons for the termination. The decision of the trial court was in error on facts as it did factor in the letter of job cancellation and fact that the show cause letter was post-termination and there was no evidence it was served. There was no evidence existed of the Appellant having been called to pick the letter.



35. On re-evaluation of the evidence before trial court the court holds that there was no valid reason for the termination established and the reason for absconding was not proved to have existed or to be the reason for the termination. The reason for job cancellation were not demonstrated to have existed. The termination to have passed fairness test it must be related to the conduct, capacity, capability or operation requirements of employer and must be after procedural fairness. The instant case did not meet the fairness test. The trial court had no basis to find the Claimant had absconded duty for 15 days yet both parties agreed he was at work on the 15<sup>th</sup> January 2021. The said show cause of 25<sup>th</sup> January 2025 stated he absconded from 16<sup>th</sup> January 2025 (page 81). The job was cancelled on 20<sup>th</sup> January 2025. The trial court decision was based on misapprehension of facts. On procedural fairness, the court established there was no evidence the show cause letter of 25<sup>th</sup> January 2021 was effected on Appellant or that he was called to pick. Further the court held the job was cancelled on 20<sup>th</sup> January 2021 effectually dismissing the Claimant without procedural fairness. The termination is held to have been wrongful and unfair and finding of absconding by trial court is set aside.

### **Whether the appellant was entitled to reliefs sought**

36. The order of reinstatement not available post 3 years of termination under section 12 (3)(vii) of the Employment and *Labour Relations Act* to wit:- "(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; "
37. On unprocedural termination, the court found the Claimant was entitled to one-month notice under section 35 of the *Employment Act*.
38. The Claimant's contract was cancelled on 20<sup>th</sup> January 2021. He is entitled to 20 days salary January 2021.
39. On claim underpayment of housing to overtime the contract of employment provided for an all-inclusive salary (page 49 of ROA).
40. On claim for salaries before August 2020, there was no contract before court on the issue.
41. On compensation for unfair termination, the Claimant was employed as per the contract on the 12<sup>th</sup> August 2020 as a Truck driver. He was dismissed unfairly on 20<sup>th</sup> January 2021. He had previously worked with the Respondent in the year 2020 before August of the year for few months. There was no reason why the Claimant could not get another job as a truck driver. He could also have worked longer from the Respondent as the contract was open-ended having expired 13<sup>th</sup> October 2020 (page 49 of ROA) and he continued working. He had some issues during employment as per the warning letters though not signed. Taking into account the above and the fact of wrongful and unfair termination the Claimant is awarded 1 month notice pay and 3 months compensation for the unfair termination.
42. He will be paid salary for 20 days in January 2021.
43. On leave there was no proof he took leave. The same is prorated for 5 months of contract. The leave days were not stated in the contract. Section 28 of the *employment Act* applies thus 21 days of leave. Thus  $5/12 \times 21/30 \times 21420$  (salary) as per contract is Kshs.6,247.50 for prorated untaken leave.

### **Conclusion**

44. In conclusion the Judgment and Decree of the Honourable D.N Musyoka (CM) delivered at Nairobi on the 24<sup>th</sup> April, 2024 in Gatundu MCELRC E002 of 2021 is set aside and substituted as follows:-  
Judgment is entered for the Claimant against the Respondent as follows:-



- a. Declaration that the termination of employment of the Claimant by Respondent was unlawful and unfair.
  - b. Notice pay KShs.21,420.
  - c. 20 days salary January 2021 KShs. 14280.
  - d. Untaken prorated leave KShs.6,247.50.
  - e. Compensation for unfair termination equivalent of 3 months' gross salary of total sum - KShs.64260/
  - f. Costs and interest at court rate from date of judgement of 24<sup>th</sup> April 2024.
45. Costs of the Appeal to the appellant.
46. 30 days' stay granted.
47. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2025.**

**J.W. KELI,  
JUDGE.**

In the presence of:

Appellant: -Ms Kimani h/b Ms Mwangi

Respondent: - Mrs Fundi

