



ISL Kenya Limited v Ndotu (Employment and Labour Relations Appeal E001 of 2022) [2025] KEELRC 1638 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1638 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2022**

MA ONYANGO, J

MAY 29, 2025

BETWEEN

ISL KENYA LIMITED APPELLANT

AND

MUTHIANI NDUTU RESPONDENT

(Being an appeal from the Judgment and decree of Honourable H. Onkwani, Principle Magistrate, delivered on 28th April, 2021 in Mavoko ELRC No. 36 of 2021)

JUDGMENT

1. This is an appeal from the judgment and decree of the Principal Magistrate's court at Mavoko by Hon. H. Onkwani, Principal Magistrate dated 28th April, 2021 in PMCC No. 498 of 2013. The Respondent who was the Claimant before the trial court, sued the Appellant (the defendant in the lower court) for unfair termination of his employment and failure to pay terminal dues and for compensatory damages.
2. After a full trial, the trial court rendered its decision wherein it found that the Claimant was unlawfully and unfairly terminated from employment and awarded him one month's salary in lieu of notice in the sum of Kshs. 19,622 and compensation of 12 months' salary of Kshs. 235,950. The Appellant was also ordered to issue a certificate of service to the Respondent and to pay the Respondent's costs for the suit.
3. The Appellant, aggrieved by the judgment, appealed against the entire judgment and decree through its Memorandum of Appeal dated 4th January, 2022 and filed on 24th January 2022 in which it raised the following grounds of appeal: -

SUBPARA 4.1-

That the Honourable Magistrate erred in law and fact when he held that the Respondent was not a casual worker in the bending section;

SUBPARA 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 and paid depending on the number of days the Respondent turned up for work;

SUBPARA 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;

SUBPARA 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.

SUBPARA 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 and was not given a fair hearing or any letter was sent to him indicating that he had absconded duty;

SUBPARA 4.6-

That the Honourable Magistrate erred in law and fact when held that the Respondent was entitled gross salary for one year for unlawful dismissal.

SUBPARA 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;

SUBPARA 4.8-

That the Honourable Magistrate erred in law and fact when he failed to consider the Appellant's submissions;

SUBPARA 4.9-

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

4.10 That the Honourable Magistrate erred in law and fact in ordering the Appellant to pay the Respondent's terminal benefit as follows:

- (i) One month's salary in lieu of notice Ksh. 19,662/=
 - (ii) Gross salary for one year for unlawful dismissal Ksh.235,950/=
- Total Ksh.255,612/=
- (ii) Appellant to issue the Respondent with certificate of service.

4. The Appellant prayed for the following orders:

- a. This appeal is hereby allowed;
- b. The judgment delivered by the Honourable Hellen Onkwani, PM on 28/04/2021 and issued in Mavoko ELRC. Cause No. 36 of 2018 Muthiani Ndotu v ISL Kenya Limited be set aside; and



- c. The Respondent be directed to pay for the costs
5. The Appeal was disposed of by way of written submissions. Both the Appellant's submissions and the Respondent's submissions are dated 16th March, 2023.

Background of the case

6. The Respondent herein was an employee of the Appellant. According to his Memorandum of Claim, the Respondent was employed by the Appellant on 2nd February, 2015 as a casual labourer in the factory bending section where he worked for 6 days a week from 7.00 am to 7.00 pm. Any time worked after 8 hours was paid as overtime.
7. The Respondent was paid at the end of every week at the rate of Kshs. 4,537.50 which would aggregate to Kshs. 19,662.50 per month.
8. It was the Respondent's case that on 23rd February, 2017 the Appellant summarily dismissed him without reasonable cause and without following proper legal procedures. The Respondent averred that the summary dismissal was unlawful and unfair as the Appellant breached the mandatory provisions of the labour laws, principles of natural justice and the Respondent's constitutional right to fair labour practice by not giving him notice, not hearing him before the summary dismissal, not being given an opportunity to appeal and failing to pay his terminal dues.
9. The Respondent averred that he was not issued with a written contract of employment and that the Appellant paid NSSF intermittently.
10. The Respondent tabulated his terminal dues as hereunder:
 - a. One months' salary in lieu of notice: Kshs. 19,662.50
 - b. Annual leave for 2 years worked: $(19,662.50 \times 21 \times 2 \div 30) =$
Kshs. 27,527.50
 - c. Public holidays for 2 years $(19,662.50 \times 11 \times 2) =$ Kshs. 14,519.17
 - d. Service pay for 2 years $(756.25 \times 15 \times 2)$ Kshs. 22,687.50
 1. The Respondent further averred that the Appellant failed to issue him with a certificate of service which he prayed for.
 2. The Respondent sought the following orders against the Appellant:
 - a. A declaration that the dismissal of the claimant from employment was unlawful and unfair and that he is entitled to payment of his terminal dues and compensatory damages.
 - b. An order for the Respondent to issue the Claimant with a Certificate of Service.
 - c. An order for payment of the Claimant's terminal dues and damages totaling Ksh.320,246.67/=
 - d. An order for the Respondent to pay the costs of this suit.
 - e. Interest on (b) and (c) at court rates.



13. 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.
14. In his witness statement filed with the Memorandum of Claim the Respondent reiterated the averments in his Memorandum of Claim.
15. The Appellant filed a Statement of Defence dated 6th February, 2019 as amended by Amended Statement of Defence dated 1st March, 2019 in which it denied that it employed the Respondent as a casual labourer in the bending section of the Appellant's factory. It pleaded that the Respondent was employed as a casual worker paid on weekly basis at the rate of 484 per day depending on the number of days he turned up for work during the week. That the Respondent abandoned work on 23rd December, 2017 and was not heard of thereafter.
16. The Appellant further averred that it paid all NSSF contributions for the Respondent for all the months he worked. The Appellant averred that the Respondent was not entitled to any of the prayers he sought in the Memorandum of Claim. It denied all other averments in the Memorandum of Claim.
17. At the hearing the Respondent stated that he was a casual at a construction site. He adopted his witness statement and produced his documents as filed. Under cross examination he stated that he worked for the Appellant from 2nd February, 2015 and left employment on 23rd February, 2017. That he did not go on leave and was never paid leave allowance. That he was informed his employment had been terminated. No reason was given to him. That the Representative of the employees did not hold a meeting at the time of his termination.
18. The Appellant called John Frederick Okello, its Human Resources Manager who testified as DW1. He adopted his witness statement and produced documents filed by the Appellant. He testified that the Respondent was engaged by the Appellant as a casual labourer in rolling mill section. That the Respondent was at work on 23rd February, 2017 and worked the whole day. He did 4 hours overtime work on that day. That the Respondent did not turn up for work on 24th February, 2017.
19. Mr. Okello testified that the Respondent was paid Kshs. 484 per day and payments were made weekly. He referred to statement of wages dated 18/2/2017-24/2/2027 at DEXH 1.
20. He testified that the Respondent was paid for leave for 2016 and 2017 relying on Documents DEXH. 6 and DEXH. 3. He further testified that the Appellant paid NSSF relying on DEXH. 4. He testified that after 24th February, 2017 the Respondent showed up for a few days in March, 2017 and worked till 17th March, 2017 then absconded again relying on DEXH. 7.
21. Under cross examination Mr. Okello stated that the Appellant did not issue any payslips, that the Respondent was paid for 11 days annual leave and went on leave for 11 days. He testified that there was no list of public holidays as there was no payment on public holidays as the company was closed.
22. He stated that the company started operations in July, 2015 and stopped operations in March, 2017 but he had not filed documents to prove the same.

The Appeal

23. The appeal was disposed of by way of written submissions. in its submissions the Appellant identified the following issues for determination: -
 - 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. 255,612 plus costs and interest.
24. 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."
25. 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."
26. 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.
27. 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. 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 ..."
28. 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."
29. 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. 255,612 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.

30. 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 totaling 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.

Respondent's Submissions

31. For the Respondent submissions were made on the following issues:
- a. Whether the Respondent was employed as a casual labourer as wrongly claimed by the Appellant;
 - b. Whether the Respondent absconded duty as wrongly claimed by the Appellant or whether the Respondent was unfairly and un-procedurally terminated from employment;
 - c. Whether the Appellant was properly held liable to payment of one month's salary in lieu of termination notice to the Respondent;

SUBPARA d.

whether the Respondent was properly awarded certificate of service, costs and interest.

32. On the first issue it was submitted for the Respondent that the Appellant failed to produce a contract of employment defining the Respondent's terms of employment. That the burden shifted to the Appellant to disprove the Respondent's claim of working at the bending section at the Appellant's factory. The Respondent relied on section 37 of the *Employment Act*.
33. It was submitted that the Respondent produced documentary evidence at page 21 of the Record of Appeal which clearly show that the Appellant intermittently paid NSSF from 2nd February, 2015 to 28th February, 2017. That this proved the Respondent worked continuously and his employment converted to permanent in accordance with section 37 of the Act. the Respondent relied on the decision in Reef Hotel Limited v Josephine Chivatsi supra.
34. On the 2nd issue it was submitted for the Respondent that Part VI of the Act provides for termination of employment and dismissal. That there is no dispute that notice was not given in accordance with section 35 of the Act or payment made in lieu thereof in accordance with section 36. That the Appellant failed to produce evidence of notice for dismissal, signed minutes of disciplinary hearing/ meeting prior to alleged termination and that there was no evidence of investigation carried out of the Respondent's absenteeism. That the termination was therefore absent of procedural fairness.
35. The Respondent relied on the decision in Ruth Nyasuguta Areimba v Conference Caterers Limited [2011] eKLR on conversion of casual employment and Elizabeth Njeri Kinyua v Joel Mugo & another



- [2019] eKLR failure of the employer to prove that it served notice to show cause for hearing on absconding of duty.
36. The Respondent submitted that the termination of the Respondent's employment was wrongful, unfair and un-procedural within the meaning of sections 35(1) and (2), 43, 45(1) and 45(2) of the *Employment Act*.
 37. On the 3rd issue it was submitted for the Respondent that the Respondent was entitled to notice under section 49(1) of the Act and was properly awarded the same, relying on the decision in *Ruth Nyasuguta Areimba v Conference Caterers Limited supra*.
 38. On the final issue the Respondent submitted that the Appellant did not produce evidence that it issued certificate of service to the Respondent. the Respondent relied on the decision in *Wycliffe Juma Ilukol v Board of Management Father Okudoi Secondary School [2022] eKLR* where the court ordered the employer to issue certificate of service under section 51 of the *Employment Act*.
 39. The Respondent prayed that this court finds and holds that the trial court properly exercised its discretion in awarding costs and interest. It urged the court to dismiss the appeal.

Analysis and Determination

40. 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 v Associated Motor Boat Co. Ltd & others [1968] EA 123*.
41. 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
 - a. Whether the Respondent was a casual employee of the Appellant;
 - b. Whether the Respondent proved that he was unfairly dismissed from employment by the Appellant; and
 - c. If the award by the Honourable Magistrate was excessive or based on wrong or irrelevant considerations as to require interference by this court.
42. It is not disputed that the Respondent was employed by the Appellant in 2015 and that he was last at work on 23rd February, 2017. The Respondent averred that he started working for the Appellant on or about 2nd 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.
43. 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;”
44. 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.
45. From the foregoing, it is clear that the Respondent was no longer a casual employee having worked continuously for more than a year.
46. 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.
47. 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.
48. 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).”
49. In the case of *Richard Maingi v Wells Fargo Limited* [2017] eKLR and *Chispine Onguso Okinyi v 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.

50. 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.
51. In the instant case it is not disputed that the Respondent was last at work on 23rd February, 2017. According to him, the Appellant summarily dismissed him on 23rd February, 2017. The Respondent did not explain how his employment was dismissed on that day as records show that he worked for the whole day and even did some overtime. It is further on record that after the said date the Respondent reported to work on 6th to 17th March, 2017 and worked for full days including earning overtime. No explanation was given by the Respondent how the termination of his employment occurred and how if this is true, he was able to report to work without hindrance from 6th to 17th March, 2017.
52. For these reasons I find that the Respondent did not prove that his employment was terminated by the Appellant on 23rd February, 2017. I accordingly find that the trial court erred in holding that the Respondent's employment was unfairly terminated by the Appellant on 23rd February, 2017.
53. On the final issue whether the awards to the Respondent were justified, the Respondent was awarded Kshs. 19,662.50 on account of one months' salary in lieu of notice and Kshs. 235,950 on account of compensation for unlawful dismissal. Having found that the Respondent did not prove that he was summarily dismissed by the Appellant on 23rd February, 2017, he is not entitled to both the salary in lieu of notice and compensation for unfair termination. The award of the trial court on the two heads are accordingly set aside.
54. The Respondent is however entitled to certificate of service, the Appellant's witness having confirmed that the same was not issued to him. The order of the trial court to the Appellant to issue the certificate of service to the Respondent is confirmed and sustained.
55. Having held as above, I find the appeal herein is merited. I accordingly make orders as follows:
 - a. The finding of the trial court that the Respondent's employment was unfairly terminated by the Appellant is set aside and replaced with an order that the Respondent did not prove that his employment was unfairly terminated by the Appellant.
 - b. The Respondent's claim in the Memorandum of Claim is accordingly dismissed.
 - c. The order for issuance of certificate of service by the Appellant to the Respondent is upheld.
 - d. Each party shall bear its costs both in the lower court and in the appeal find merit in the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY, 2025

MAUREEN ONYANGO

JUDGE

