Oburo v Frodak Kenya Limited (Appeal E025 of 2024)
[2025] KEELRC 2353 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 2353 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E025 OF 2024

JK GAKERI, J

MAY 28, 2025

BETWEEN

PETER OCHOLA OBURO ..... APPELLANT

AND

FRODAK KENYA LIMITED ..... RESPONDENT

JUDGMENT

This is an appeal against the Judgment delivered by Hon. Nyigei PM on 10th June, 2024 in Kisumu MCELRC No. 4 of 2019 **Peter Ochola Obura V Caroline A. Ager**.

Briefly, the facts of the case are that the appellant filed a claim on 25th January, 2018 claiming unlawful termination of employment by the respondent having been employed in 2012 until 26th May, 2017, allegedly after the respondent lost a contract with Kibos Sugar Allied Industries Ltd, and was thus declared redundant.

The appellant prayed for declaration that termination of employment on account of redundancy was unfair, malicious discriminatory and unlawful, salary in *lieu* of notice Kshs.24,000, 12 month's compensation Kshs.288,000, severance for 3 years, Kshs.36,000, leave dues Kshs.50,400 and unpaid holidays Kshs.55,383.00 total Kshs.464,984.62, costs and interest.

An amendment to the claim effected on 9th January, 2023 did not alter the character of the claim.

By an amended response dated 13th September, 2023, the respondent denied having employed or terminated the appellant's employment and without prejudice averred that the appellant was an employee of FRODAK (K) Ltd as its Operations Manager at Kibos Sugar & Allied Industries Ltd; failed to report to work for 3 weeks, thus absconding duty, and was dismissed from employment in accordance with the law.

The respondent denied that the appellant was entitled to any of the reliefs prayed for and sought dismissal of the suit.

Both parties filed submissions addressing the question of separation and the reliefs sought among others.

After considering the evidence and submissions by the parties, the learned trial Magistrate found that the appellant's employment was terminated for absconding duty for 3 weeks, was not declared redundant, was not entitled to any of the reliefs sought and dismissed the suit with costs to the respondent.

This is the Judgment appealed against.

The appellant assails the Judgment of the trial court on the grounds that it erred in law and fact by:

1. Failing to direct its mind on the provisions of the *Employment Act*.
2. Finding that the appellant was not entitled to the reliefs sought.
3. Stating that the appellant had not proved his case.
4. Failing to consider the appellant's oral testimony that he was summarily dismissed.
5. Dismissing the appellant's claim in its entirety.
6. Holding that the address used to serve the notice to show was his without the respondent proving so.
7. Failing to consider submissions by the appellant.
8. Holding that the appellant absconded duty and had failed to prove his case as envisaged by Section 47(5) of the *Employment Act*.
9. Failing to consider and accord proper attention to the appellant's evidence.
10. Failing to evaluate, analyse, consider and determine all the issues raised during the trial therefore arriving at an erroneous Judgment.
11. Misdirecting itself and acted on the wrong principle in reaching the judgment and exhibited bias.

Ground number 12 of the Memorandum of Appeal is unclear.

Appellant's submissions

As to whether the trial court erred in law and fact by no considering the appellant's admission that termination of employment was not on account of redundancy, counsel urged although the general principle is that parties are bound by their pleadings, evidence admitted without objection can be relied upon by the court.

Reliance was placed on the decisions in **Independent Electoral and Boundaries Commission (IEBC) & another V Stephen Mutinda Mule & 30 others [2014] eKLR, Galaxy Paints Co. Ltd V Falcon Guards Ltd [2000] eKLR** as well as **Odd Jobs V Mubia [1970] EA 476,** to urge the court to consider the appellant's oral testimony.

On the trial court's finding that the appellant had not proved his case, counsel relied on the sentiments of the court in **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR** to urge that a termination of employment must be substantively and procedurally fair and in this instance it was procedurally unfair as the employer did not issue a notice to show cause.

Reliance was placed on the decision in **Kenya Revenue Authority V Mwongela [2025] KECA 262 (KLR)** where the employer had used an incorrect postal address and it was held that the same violated the principles of procedural fairness.

Also cited was the decision in **Rotich V Metkei Multi-Purpose Co. Ltd [2021] KECA 161 (KLR)** to urge that the burden of proof lay on the respondent to prove that the letters were sent to the appellant.

On substantive fairness, reliance was made on the provisions of the *Employment Act* and the decisions in **Kenya Ports Authority & another V Joseph Makau Munyao & 4 others [2019] eKLR** and **Martin**

Muriithi Maina V Barclays Bank of Kenya ELRCC No. 168 of 2014, to submit that the respondent had not demonstrated that it had a valid reason to terminate the appellant's employment.

On entitlement to compensation for unlawful termination of employment, counsel submitted that having proved that his employment was unfairly terminated, he was entitled to compensation as held in **Benjamen Langwen V National Environment Management Authority [2016] eKLR**.

On leave days, reliance was placed on the decision in **Dakawou Transport Ltd V Kithuku [2025] KEELRC 452 (KLR)** to urge that it was the duty of the respondent to maintain records as by law required.

Concerning public holidays, counsel cited the sentiments of the court in **Togom V Radar Ltd [2024] KEELRC 112 (KLR)** where the court award Kshs.25,659 for 11 public holidays per year, to argue that since the appellant was not the custodian of records and the respondent did not avail the same, it was liable to pay for public holidays.

Respondent's submissions

As regards grounds 1, 3, 4, 5 and 8 of the memorandum of appeal, counsel submitted that the appellant failed to adduce evidence on his alleged unlawful termination on account of redundancy as required by the provisions of Section 47(5) of the *Employment Act* since parties are bound by their pleadings.

This is because the appellant denied having been declared redundant.

Reliance was placed on the decision in **Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR; IEBC & another V Mutinda (supra)** and the sentiments of the court in **Said Salim Mtomekela V Mohamed Abdallah Mohammed Dar Es Salaam** Court of Appeal No. 149 of 2019 to urge that ground 4 of the memorandum of appeal was misplaced.

Counsel submitted that since the appellant failed to amend his pleadings, he could not at this urge the court to consider his oral testimony as opposed to his pleadings and thus failed to prove that termination of employment on account of redundancy was unlawful and the grounds 1, 3, 4, 5 and 8 were unmerited.

On grounds 6, 7, 9, 10, 11, 12 and 13, counsel submitted that the trial court considered the submissions by the parties and evaluated and analysed all issues raised during trial.

Finally, counsel submitted that the appellant was invited for a disciplinary hearing, had previously been issued with a notice to show cause on his absenteeism, letters he ignored and was thus accorded a fair hearing.

Analysis and determination

It is common ground that the appellant was an employee of the respondent from 4th October, 2012 until his employment was terminated on 26th July, 2017.

The gravamen of the appellant's case is that the learned trial magistrate got everything wrong and arrived at an erroneous judgment.

Significantly, the court is alive to the reality that this is a first appeal and its duty is as was laid down by the Court of Appeal in **Peters V Sunday Post [1958] EA 424** and **Selle and another V Associated Motor Boat Co. Ltd [1968] EA 123** where the court stated that:

...This court is not bound necessarily to accept the findings of fact by the trial court. An appeal to this court... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.

Briefly put, they 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".

See also **Mursal & another V Manese (suing as the Legal Administrator of Dalphine Kanini Manesa** [2022] KEHC 282 (KLR).

Because the trial court's judgment is generally faulted on evidential matters, it is essential to re-evaluate and reconsider the evidence on record.

First, the claimant's witness statement on record dated 9th January, 2023 as amended was signed by his counsel on record and generally replicated the amended statement of claim of even date and other than the date of employment, positon, new contract dated 1st June, 2015 between the appellant and the respondent and date of dismissal from employment, the written witness statement is silent on how the separation took place but for a cursory mention that he was declared redundant, and faults the respondent for violating other provisions of the *Employment Act* except Section 40(1) of the Act which is specific to redundancies.

On cross-examination, the appellant testified that his postal address was 2068 Kisumu. That the last day at work was when he requested for permission to attend a funeral sometime in May 2017 and it was given by word of mouth by the Director, Mr. Fredrick Onyango and he is the one who wrote the phone message asking where the appellant was. That he decided to stay home when he found no one in the office.

It was the appellant's evidence that the site supervisor had told him that he was required in the office and the supervisor was the appellant's junior.

He admitted that the was an employee of the respondent and it paid his salary which was consolidated.

The appellant admitted that he had no schedule of leave days and could not quantify unpaid holidays.

The appellant further admitted that his employment was not terminated on account of redundancy and had no evidence to show that he attended a funeral and last worked on 16th May, 2017 and denied having absconded duty.

The appellant testified that he did not receive the notice to show cause or invitation to attend a disciplinary hearing but received the letter of termination of employment.

RWI, Carolyne Awino Ager testified that she was the respondent's accountant and administrator and leave was given by Human Resource orally if less than a week and in writing if more than a week.

That the claimant had provided a postal address for purposes of communicating with him and was called and messages sent to him but did not return the calls and could not explain why he was not at work.

RWI confirmed all the appellant's leave days were fully paid on termination of employment.

That the witness confirmed that the respondent had a contract with Kibos Sugar in 2019 and the claimant never notified the directors of his absence and had provided a different postal address.

The issues for determination are

i. whether termination of the appellant's employment by the respondent was unfair or he absconded duty; and

ii. whether the appellant is entitled to the reliefs sought.

On termination of employment, it is important to note that for unexplained reasons, the appellant alleged that he was declared redundant while fully aware that he was not.

He admitted on cross-examination that his employment was not terminated on account of redundancy and documents availed by the respondent revealed that it had a running contract with Kibos Sugar and Allied Industries Ltd, effective 22nd August, 2016 for a term of 2 years and it was therefore subsisting in May 2017 when the appellant alleged that the respondent lost the contract, which implicated his credibility as a witness.

It is trite law that parties are bound by their pleadings. The appellant could not change the story in court without amending his claim. See **IEBC & another V Mutinda & others (supra)** and **Galaxy Paints Ltd V Falcon Guards Ltd (supra)**.

The foregoing notwithstanding, the respondent raised the issuing of desertion or absconding of duty by the appellant as its defense. It was incumbent upon the respondent to prove that the appellant deserted the work place since the appellant denied it.

On absconding of duty, while the appellant testified that he did not, the respondent testified that he did and his employment was terminated on that basis.

According to Black's Law Dictionary 10th Edition, desertion means:

The wilful and unjustified abandonment of a person duty or obligations"

In **Seabolo V Belgravia Hotel [1997] 6 BLLR 829 (CCMA)**, the court distinguished desertion from absence from duty as follows:

...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return.

In **Ronald Nyambu V Tornado Carriers Ltd [2019] ekLR** Ndolo J stated:

Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissed".

In his evidence in chief in court, the appellant testified that he had requested for permission for 3 days to attend a funeral. He did not disclose where the funeral was or whether it was a relation, friend or neighbour and when he reported back and his junior (the site supervisor) told him to report to the main office and went on a Friday, the director was away, on Monday the director was in town and was not there on Tuesday and opted to stay home until received the letter of termination of employment.

Instructively, the appellant's witness statement did not set out these details and there was no way of verifying their truthfulness or credibility.

Puzzlingly the appellant confirmed that he last worked on 16th May, 2017 but could not explain what he was doing at home and avoiding the workplace.

Similarly, he did not deny having been called or messages sent to ascertain his whereabout.

Having admitted on oath that after he missed the director on a Tuesday, he stayed a home until he received the notice of termination of employment, the appellant was indeed admitting that he absconded duty or deserted the workplace without informing any of the directors or anyone other person. He had their telephone numbers and could reach them on the phone as opposed to reporting to the office at the instigation of his unnamed junior. He did not confirm with the director concerned that he was required at the office before proceeding there for 3 days consecutively. The appellant could not explain why the director had to go through a 3rd party to communicate with him yet the messages on record are from the director's phone number.

The appellant's testimony that he was required to report to the office and proceeded there for three days does not sound convincing or probable.

Based on the evidence on record, the court is in agreement with the finding of the trial court that the appellant deserted the work place.

Similarly, the respondent has demonstrated that it made reasonable attempts to have the appellant resume duty but he was adamant.

However, it was still incumbent upon the respondent to dismiss or terminate his employment on account of the desertion or absconding of duty.

In **Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd [202] eKLR** Maureen Onyango J held:

Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007..."

This is because for a termination of employment or dismissal from employment to pass the fairness test under Section 45 of the *Employment Act*, it must be demonstrated that the employer had a valid and fair reason to do so and conducted the termination of employment or dismissal in accordance with a fair procedure.

Put in other words, the employer must have had a substantive justification for the termination of the employee's employment and must have conducted the termination process fairly as aptly captured by Ndolo J in **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR** and the Court of Appeal in **Naima Khamis V Oxford University Press EA Ltd [2017] eKLR**.

Whereas the appellant's absconding of duty as patently admitted in court on oath constituted the substantive justification for his dismissal, the respondent was still duty bound to discharge the burden of proof that the procedure it employed was fair.

The jurisprudence emerging from this court is that where an employer pleads that the employee absconded duty, the employer is then required to prove the desertion by adducing evidence to prove the reasonable steps it took to have the employee resume duty and/or be aware that termination of his or her employment on account of the desertion was being considered, as it happened in this case (see **Felistas Acheha Ikatwa V Peter Otieno [2018] eKLR**, **Simon Mbithi Mbane V Inter Security Services Ltd [2018] eKLR**, **Joseph Nzioka V Smart Coatings Ltd [2017] eKLR** and **Bonface Mwangi V Iyego B.O.M. Secondary School [2019] eKLR**).

Specifically, the provisions of Section 41 of the *Employment Act* ought to have been complied with.

The elements of Section 41 as tabulated by the Court of Appeal in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** are reasons for which termination of employment is being considered, reason for termination, explanation of the charges in a language understood by the employee, entitlement of the employee to a colleague of his or her choice during the explanation and hearing and considering the representations by the employee or the colleague.

Although the appellant testified that he neither received the notice to show cause nor invitation to attend the disciplinary hearing, he admitted on oath having received the letter of termination of employment while at home.

All the four (4) letters from the respondent to the appellant relating to his absconding of duty bear the same address P. O. Box 29 Oboch, which RW testified that the respondent was given by the appellant.

All the letters except the one forwarding the minutes of the disciplinary hearing bear a certificate of postage from the Postal Corporation of Kenya, Kisumu, which is evidence that the letter was in fact posted.

If the Post Office Number used by the respondent was incorrect, how then did the appellant receive the letter of dismissal from employment if his address was P. O. Box 2068, Kisumu as he testified in court?

Having texted the appellant to report to work and he declined and having further posted a notice to show cause to the appellant, which he did not respond to and further having posted an invitation to a disciplinary hearing, which the appellant did not honour and the meeting proceeded in his absence, a decision made and posted to him and he received it, the court is satisfied that the respondent acted reasonably and cannot be faulted for having summarily dismissed the appellant in the manner it did it.

The appellant's oral testimony that he neither received the notice to show cause nor invitation to attend the disciplinary hearing, evidence he conveniently omitted in his witness statement cannot avail him as in the court's view, the respondent posted the letters to the Box number he had availed and RW so testified on re-examination and if it was incorrect, the appellant ought to have explained how he received the dismissal letter and did not testify that it was either taken to him at home or he collected it from the respondent.

Having demonstrated that the letters were posted to his last known postal address, the respondent thereby discharged the burden of proof that it not only ascertained his whereabout and notified him that his termination of his employment on account of desertion was being considered but also accorded the appellant an opportunity to be heard but he did not wish to participate, just as he did not wish to continue working as evidenced by the phone messages with the director on 15th June, 2017, and made no follow up until he received a letter of dismissal which appear to have awakened him.

Under Section 47(5) of the *Employment Act*, the employee is required to demonstrate a *prima facie* case his/her employment was terminated and that the termination was unfair or unlawful.

As the learned trial magistrate found, the appellant did not care about his employment even after the director's phone message.

Having admitted that he deserted the work place to stay at home, the only other thing the respondent was required to demonstrate was that the separation was effected in accordance with a fair procedure, which the respondent did.

In sum, the court is in agreement with the trial court that the appellant failed to prove that termination of his employment by the respondent was unlawful or unfair as he was not declared redundant.

As regards reliefs sought, the court proceeds as follows:

Having found as above, the claim for salary in *lieu* of notice, and 12 months salary compensation are unsustainable and thus declined.

Second, since the appellant admitted on cross-examination that he was not declared redundant, the prayer for severance pay was unavailable.

Third, on leave days, the appellant admitted that he had no schedule of leave days and was thus unaware when they accrued. Equally the appellant's written witness statement had no particulars for leave days.

However, RWI admitted that the claimant never went on leave and is thus awarded leave pay for 63 days, Kshs.50,400.00.

Fourth, the claim for unpaid holidays lacks particulars and was unmerited. The court cannot assume that the appellant worked on all public holidays for the duration of his employment, yet he could not identify the dates.

In addition, RWI confirmed on cross-examination they did not work on public holidays.

Finally, having admitted on cross examination that his employment was not terminated on account of redundancy as pleaded, the declaration sought was patently unmerited.

The appellant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.

Other than the claim for leave days for which the appellant is awarded Kshs.50,400.00 the appeal is unsuccessful and as a consequence, each party shall bear own costs of the appeal.

For the avoidance of doubt other awards made by the trial court are upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE